(23,304)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 729.

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, PLAINTIFF IN ERROR,

vs.

MRS. ADELIA P. DANAHER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Caption—First Appeal.*

Pleas Before Hon. Jas. H. Stevenson, Judge of the Pulaski Circuit Court, Second Division, had on the 14th Day of April, 1909, in the Case of

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Defendant.

Suit for Statutory Penalty on Account of Defendant's Refusal and Failure to Render Service When Requested by Plaintiff.

Verdict by direction of the Court, for the Defendant.

2 Pulaski Circuit Court.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY, Defendant.

Complaint.

For cause of action against the defendant, plaintiff alleges:

That she is a resident of the City of Little Rock, Arkansas.

That the defendant, the Southwestern Telegraph & Telephone Company, is a corporation organized and existing under the laws of the State of Texas, and, as such, is engaged in the business of operating a general telephone exchange in the city of Little Rock, under a franchise from said City, for the purpose of supplying the residents of said City with telephones and telephone connection through its central office or exchange located in said city, so that all residents of said city who are subscribers to said exchange, and have defendant's telephone instruments in their residences and places of business may communicate, by means of such telephones, with any and all other such subscribers.

That the plaintiff is, and for many years has been, a subscriber to defendant's said telephone exchange, and, as such, has had a telephone in her residence in said city, said telephone being numbered Nineteen Hundred and Fifty (1950), which telephone was connected with the said central office or exchange of the defendant in said city, and was at all times upon plaintiff's call furnished with connections to all other telephones in said exchange, until the Thirtieth (30th) day of March, 1908, when the defendant
3 disconnected said telephone, and arbitrarily refused to permit plaintiff to use same, and it continued so to refuse until the 8th day of May, 1908, when it again connected said telephone with its exchange.

That the plaintiff promptly paid to defendant the amount demanded by it as rental for said telephone and service for the said months of March, April and May, 1908, and fully complied with all its rules and regulations.

The defendant refused to permit plaintiff to use said telephone during all of said time from the 30th day of March, 1908, to the 8th day of May, 1908, both of said days included, and each and every day of said period, and refused, on each and all of said dates, to answer any call made by plaintiff through said telephone, or to call plaintiff at the request of any other subscriber asking for connection with plaintiff's telephone through its said exchange, greatly to her injury and inconvenience.

That, by virtue of the statutes of this State, it is made the duty of defendant to furnish all applicants for telephone connection with such service and facilities, without discrimination or partiality, provided such applicants comply with all of defendant's reasonable rules and regulations, and, upon failure to do so, a penalty of One Hundred Dollars for each day of such discrimination is provided.

The defendant has discriminated and shown partiality against this plaintiff each day for the forty days commencing March 30th, 1908, and ending May 8th, 1908, in this: that other persons, subscribers to said telephone exchange, were permitted to use their telephones at their residences, and were given connections through said exchange, provided they paid to defendant the rental
4 price for such telephones and service for said period, as plaintiff did, and said other subscribers were permitted to have connection with the telephones of other subscribers in the said city of Little Rock and elsewhere for the purpose of transmitting messages and communicating through telephones to all persons having telephones, upon their payment of an amount of money equal to that paid by plaintiff for like service for said period, while, during the above mentioned period, and on each and every day thereof, the defendant refused to allow plaintiff to use said telephone, and continuously kept same cut off from its switch board, so that no call made by plaintiff was received at the central office or exchange of defendant, and the employees of said defendant at said central office or exchange during all of said time refused to connect plaintiff's telephone with that of any other subscriber who called for such connection, while, during all of said time, defendant furnished to other subscribers, in like situation, such service and connections.

That the unjust and unwarranted discrimination against plaintiff, above set out, continued for the space of forty days, as aforesaid, and, by reason of such unlawful discrimination and partiality, defendant has subjected itself to a penalty of One Hundred Dollars for each and every day during the said period, payable to plaintiff, amounting, in the aggregate to the sum of Four Thousand Dollars ($4,000.00), for which sum plaintiff prays judgment against the said defendant, together with all her costs and other proper relief.

AUSTIN & DANAHER,
MALLOY & DANAHER,
Attorneys for Plaintiff.

(Endorsed:) "Filed and summons issued this 30th day of May, 1908. P. H. Carnes, Clerk. L. J. Gibson, D. C." Return on summons shows service on P. K. Baker, Supt. of S. W. Tel. & Tel. Co. June 1, 1909.

5 *Filing Answer.*

Pulaski Circuit Court, Second Division, March Term, 1908, Saturday, Aug. 15th, 1908.

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

Comes the defendant by W. J. Terry, its attorney, and by leave of the court files herein its answer to the complaint.

6 In the Pulaski Circuit Court, Second Division.

ADELIA P. DANAHER
vs.
THE S. W. T. & T. Co.

Answer.

Answering the complaint herein, the defendant denies that on March 30, 1908, or at any other time, it disconnected plaintiff's telephone No. 1950 and arbitrarily refused to permit the plaintiff to use the same from March 30, 1908, to May 8th, 1908, or for any other time. It denies that the plaintiff paid to defendant the amount due it for telephone service for the months of March, April and May, 1908, or that she complied with the rules and regulations of defendant company.

It denies that it has discriminated or shown partiality against the plaintiff in any manner whatever, or that it has granted telephone connections, service and facilities to other persons in like situation with the plaintiff.

Further answering, defendant says that on March 13, 1908, the plaintiff paid defendant two dollars for which it duly receipted her, and at the same time and on several occasions prior thereto defendant notified her that there was a balance of $4.00 for two months' prior telephone rentals due by her to defendant; that plaintiff denied this indebtedness and claimed to hold receipts showing the same to have been paid, which receipts plaintiff promised to produce from time to time, but failed and refused to produce, either at the
7 office of defendant or at the residence of the plaintiff when requested by the defendant.

Defendant says that one of its rules is to refuse telephone service to such persons as neglect or refuse to pay their telephone rentals

for preceding months after being notified of such neglect or refusal; that this rule is reasonable and necessary to the proper conduct and carrying on of its business of supplying the public with telephone service, and that the same was known to the plaintiff, and was a part of the contract existing between the plaintiff and defendant in the rendering of such telephone service; and this defendant cannot be required to serve the plaintiff or the public with telephone connections and facilities without pay, as to do so would deprive it of its property without due process of law and would be denying it the equal protection of the law, in contravention of the Constitution of this State and of the Constitution of the United States, and, particularly, the Fourteenth Amendment thereof. That on March 20th, 1908, the plaintiff was indebted to defendant for two months' rental of said telephone No. 1950, aggregating $4.00, and that on said date defendant mailed to the plaintiff at her residence No. 2022 Izard Street, in the city of Little Rock, Ark., a written notice in the usual form advising her that her said rental was then past due and that if the same was not paid on March 30, 1908, her said telephone service would be discontinued, which said notice was received by the plaintiff; that the plaintiff failed or refused to pay said rental on March 30, 1908; that on March 30, 1908, the plaintiff was called up by telephone and again reminded of such delinquency and again notified that if said bill was not paid her telephone service would be discontinued. The plaintiff failed or refused to pay said past
8 due rental, and thereupon defendant disconnected plaintiff's telephone and refused further to furnish her telephone service, because of the plaintiff's failure and refusal to pay therefor and for no other reason.

Wherefore, defendant asks to be discharged herefrom with its costs.

WALTER J. TERRY,
Attorney for Defendant.

(Endorsed:) "Filed August 15th, 1908. P. H. Carnes, Clerk. By R. B. Brodie, D. C."

9 *Filing Amended Answer.*

September Term, 1908, Monday, Nov. 30th, 1908.

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

Comes the defendant, by its attorney, W. J. Terry, and by leave of the court, files herein its amended answer.

10 In the Pulaski Circuit Court, Second Division.

ADELIA P. DANAHER, Plaintiff,

VS.

THE SOUTHWESTERN T. & T. Co., Defendant.

Amended Answer.

For further answer to the complaint herein defendant says:

That by virtue of Section I of the Act of the General Assembly of the State of Arkansas, approved March 31st, 1885, entitled, "An Act Granting Certain Privileges to and Prescribing Certain Duties of Telegraph & Telephone Companies and for other Purposes." the privileges therein contained were conferred upon persons as well as upon companies or corporations but that by Section II of said Act the duties and penalties of said Section II are only imposed upon telephone companies or corporations, and that said Section II of said Act in imposing such penalties upon a company or corporation engaged in the telephone business, and not imposing such penalties upon any person or persons engaged in like business, is an arbitrary discrimination of classification, and denies to this defendant and other telephone companies and corporations engaged in the telephone business the equal protection of the law, and is contrary to and in conflict with Section I of the 14th Amendment of the Constitution of the United States; and that in exempting persons engaged in the telephone business from such penal-

11 ties while imposing such penalties upon companies and corporations engaged in the telephone business it grants privileges and immunities to such persons so engaged in said telephone business which are not granted to companies or corporations engaged in like business and is therefore contrary to and in conflict with Section 18 of Article 2 of the Constitution of the State of Arkansas, and is also contrary to and in conflict with Section 1 of the 14th Amendment of the United States.

Demurrer.

And said defendant demurs to the complaint herein and for cause of demurrer says: That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore the defendant prays to be dismissed with its costs in this action expended.

WALTER J. TERRY,
Attorney for Defendant.

(Endorsed:) "Filed Nov. 30th, 1908. F. J. Ginocchio, Clerk. By L. J. Gibson, D. C."

12 *Trial.*

March Term, 1909.

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Defendant.

WEDNESDAY, *April* 14, 1909.

On this day comes the plaintiff by her attorneys, J. E. Williams, Austin & Danaher and Palmer Danaher, and comes the defendant by its attorney, W. J. Terry, and this cause now coming on to be heard, both parties announce ready for trial, and both parties waiving a jury of twelve men and consenting that this cause be tried by a jury of nine men, thereupon comes a jury of nine good and lawful me-, all of the regular panel of petit jurors in this court, who were first duly selected, empaneled and sworn to try the issues of facts arising herein, and after hearing all the evidence adduced, and the hour of adjournment having arrived further proceedings in this cause are postponed until tomorrow morning at nine thirty o'clock, and the jurors after first receiving the due admonition of the court are permitted to separate until that time.

13 *Judgment.*

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Defendant.

THURSDAY, *April 15th*, 1909.

On this day come the parties hereto by their respective attorneys and come also the jury empaneled herein and the court thereupon instructs the jury to return a verdict for the defendant; and the jury thereupon returns into court the following verdict, viz:

"We the jury find for the defendant by direction of the court.
(Signed) I. PAREIRA, *Foreman.*"

It is therefore considered, ordered and adjudged by the court that the plaintiff do have and recover nothing for her cause of action herein, and that the defendant have and recover of and from the plaintiff all its costs herein expended.

And thereupon the plaintiff asks and is by the court granted ten days in which to file her motion for a new trial of this cause.

14 *Filing Motion for New Trial.*

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

SATURDAY, *April 24th*, 1909.

Comes the plaintiff by her attorneys, J. E. Williams, Austin & Danaher and Palmer Danaher, and by leave of court files herein her motion for a new trial of this cause, and said motion now coming on to be heard, the court being well and sufficiently advised doth overrule said motion, to which ruling of the court, the plaintiff at the time excepted and asked that her exceptions be noted of record, which is hereby accordingly done, and the plaintiff thereupon prays an appeal to the Supreme Court of Arkansas, which prayer is by the court granted and the plaintiff is allowed ninety days in which time to prepare and present her bill of exceptions.

(For Motion for New Trial, see page 135.)

15 *Filing Bill of Exceptions.*

March Term, 1909.

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

JUNE 29, 1909.

On this day comes the plaintiff by her attorneys Austin & Danaher and J. E. Williams and Palmer Danaher and presents to the court her bill of exceptions, and upon examination thereof, said bill of exceptions are found in all things correct and signed by the Judge and the Clerk ordered to file them as part of the records in this case.

16 In the Pulaski Circuit Court, First Division.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Defendant.

Bill of Exceptions.

This cause coming on for hearing, on the 14th day of April, 1909, before the Honorable R. J. Lea, Judge presiding, and a jury

duly empaneled, the plaintiff appearing by Messrs. J. E. Williams, Austin & Danaher and Palmer Danaher, and the defendant appearing by Walter J. Terry, Esquire, both sides announcing ready for trial, the following evidence was introduced, proceedings had and exceptions saved, as follows, to-wit:

The plaintiff, to sustain the issues upon her part, introduced the following testimony:

17 *Testimony of Mrs. Adelia P. Danaher.*

Mrs. ADELIA P. DANAHER, the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By M-. DANAHER:

Q. Your name is Mrs. A. P. Danaher?
A. Yes, sir.
Q. Where do you live?
A. 2022 Izard St., Little Rock, Arkansas.
Q. Have you been a subscriber to the Southwestern Telegraph & Telephone Company?
A. I have.
Q. For how long?
A. Eight or ten years, I don't know exactly the time.
Q. Were you a subscriber of that company during the months of March, April and May 1908?
A. Yes sir.
Q. Had a phone in your residence?
A. Yes, sir.
Q. Do you remember what the charges of that company were for telephones in March 1908?
A. Two dollars and seventy-five cents, per month.
Q. Was it the same for April and May?
A. Yes, sir.
Q. Formerly they had another rate did they?
A. Yes, sir.
Q. What was the former rate?
A. Two dollars.

18 Q. Did you pay to the telephone company or its collectors their regular charge for your telephone for every month since you first had the telephone?
A. I have.
Q. Did you pay for the months of March, April and May, 1908?
A. I did.
Q. Have you the receipts for those three months?
A. I have.
Q. Are those the receipts?
A. Yes, sir.

Mr DANAHER: *Q.* I wish to introduce these receipts if Your Honor please.

New Form 204

PAYABLE AT COMPANY'S OFFICE
TELEPHONE BUILDING, 7th AND LOUISIANA STS., LITTLE ROCK

PLEASE SEND BILL WITH REMITTANCE

DISCOUNT OF 50 CTS. ALLOWED IF PAID ON OR BEFORE THE 15th

OFFICE HOURS, 8:30 A. M. TO 5:30 P. M.

O DEBIT$ TO Dauaher, M.S.
2022 Izard

Rental of Telephone and Lines with Exchange service payable in advance as per contract.	Apr.	2 75
TOLL CHARGES for previous month as per detail below		$
Rental Bal	30th, as per bill rendered, $	4
Toll Bal	[illegible], as per bill rendered, $	
	TOTAL	6 75
	LESS DISCOUNT	
	NET AMOUNT PAID	2 75

Paid in Cash, - $ 2 75
Paid in Franks, $

4/20/08
W. C. McGuire

ADVISE BY MAIL CHANGES IN NAME AND LOCATION FOR NEXT ISSUE OF DIRECTORY

New Form No. 206

10

SPECIAL RECEIPT

Received from Dauaher M.J.

Tel. No. 1950

Credit on account of May bill amounting to $ 6 75

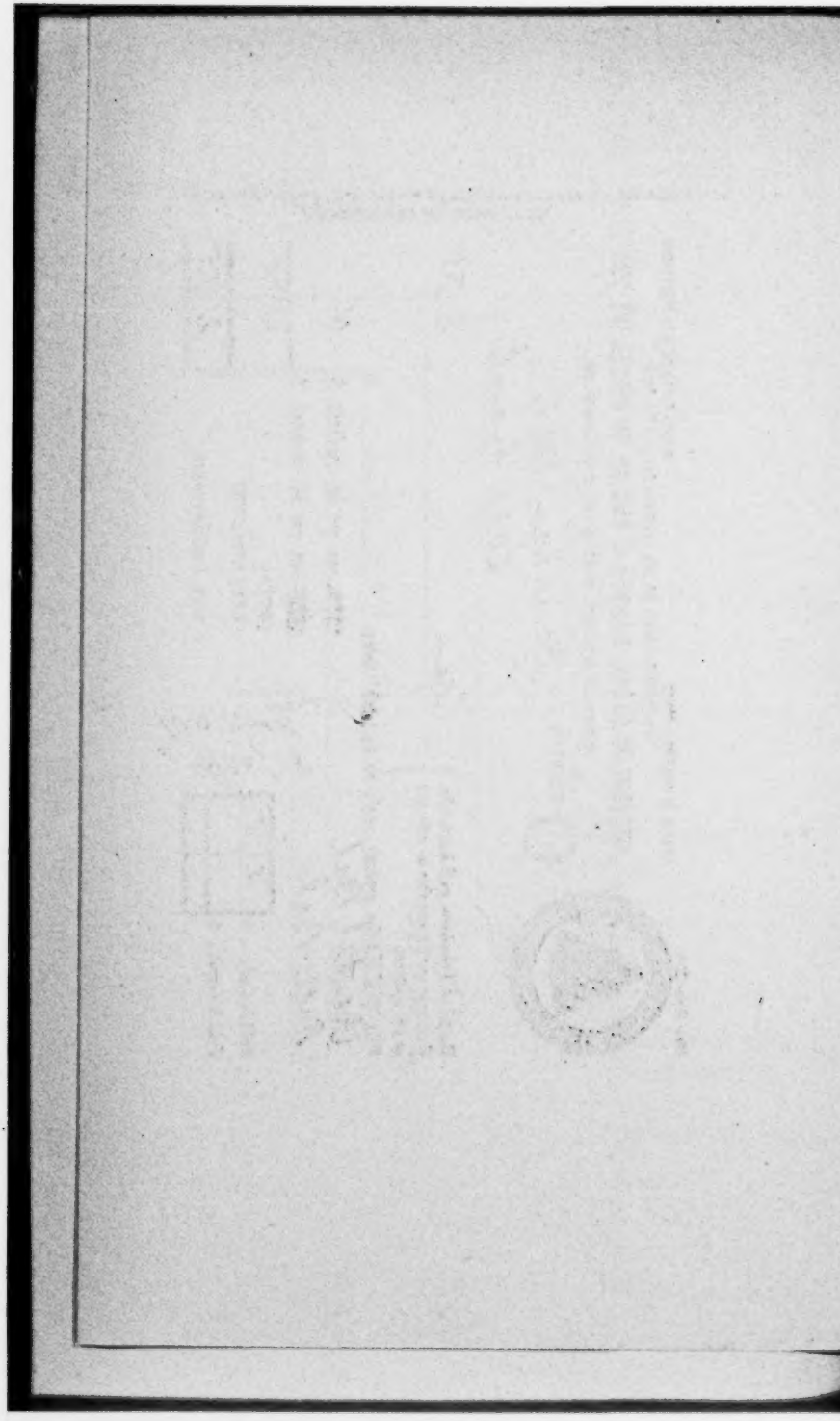
One Rental $ 2 75 Toll $

Paid May 2. 1908
L. W. Tel & T. Co.
A. M. J.

Paid in cash $ 2 75
Paid in Franks

$ 2 75

19



No. 10.

All Bills payable in Advance.

LITTLE ROCK, ARK., *Jun-* 1, 1908.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance due on Bills previously rendered	$4
To Rental of Telephone Instrument and Exchange Service Month Ending Mar. 31, 1908	2
	$6
By c.	2
Bal.	4

Received Payment for the Company.

CHAS. VEDDER.

3–13–08.

(Here follow fac-similes marked page 19.)

20 Q. When did the controversy first arise between you and the telephone company about you owing them any bill?

A. That is a hard question to answer.

Q. Do you mean you don't know just when it was?

A. I don't know sir, no sir.

Q. What was said by you to the collectors of the telephone company when they first presented and kept presenting these bills with a balance due on them?

A. I told them I had paid it and never would pay it over again.

Q. Did any of the bills show what month it was for, the back balance?

A. No, I didn't know what it was for.

Q. Didn't they ever tell you what month it was for?

A. No, sir.

Q. Was there any adjustment of the matter ever had between you and the telephone company's collectors?

A. No, sir. I told them at the office too that I didn't owe it and would pay it.

Q. Did they make any correction in their bills when you would make that statement to them?

A. They said they would see about it.

Q. Did they send any other bills showing any different state of facts after making those statements?

Mr. TERRY: The question is objected to.

The COURT: The objection is overruled.

To which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record.

21 Q. After your making the statement to them that you didn't owe the balance, did they send any bills after that showing a different state of account, or any balance due?

A. Yes, sir.

Q. Have you some of those bills here.

A. Yes, sir.

Q. I hand you herewith a bunch of receipts commencing with the month of September, 1907, and ending November, 1908, can you identify those as receipts received by you from the telephone company?

A. Yes, sir.

Q. I wish you would just state to the jury how much balance is shown to be due on this first bill, September, 1907, back balance?

A. Four dollars.

Mr. TERRY: The bills will show for themselves.

The COURT: Read the bills.

Whereupon the following receipts were introduced in evidence:

2022 Izard.

No. 1267. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Sept.* 1, 1907.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance due on Bills Previously Rendered	$2.00
To Rental of Telephone Instrument and Exchange Service Month Ending Sept. 30th	2.00
	4.00
By Cash	2.00
Bal.	2.00

Received Payment for the Company.
9-21-7. W.

22 11.

2022 Izard.

No. 1267. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Oct.* 1*st*, 1907.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance due on Bills Previously Rendered	$2.00
To Rental of Telephone Instrument and Exchange Service Month Ending Oct. 31st	2.00
	$4.

Received Payment for the Company.

—— ——.

[Written across face:] By cash $2.00, 10/4/07. C. A. Jeffries.

11.

2022 Izard.

No. 1267. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Nov.* 1, 1907.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance Due on Bills Previously Rendered	$4
To Rental of Telephone Instrument and Exchange Service Month Ending Nov. 30th	2
11–13–7.	
By Cash	2.00
Bal.	4.00

Received Payment for the Company.

S. C. OATES.

11.

2022 Izard.

No. 1267. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Dec.* 1, 1907.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance Due on Bills Previously Rendered..... ....
To Rental of Telephone Instrument and Exchange Service Month Ending Dec. 31st..... ....

Paid.
C. C. M.

12/6/07.

Received Payment for the Company.

———.

23

11.

2022 Izard.

No. 1267. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Jan.* 1, 1908.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance Due on Bills Previously Rendered..... $4
To Rental of Telephone Instrument and Exchange Service Month Ending Jan. 31st..... 2.00

1/18/08. By Cash..... 2
4

Received Payment for the Company.
W. C. McGUNN.

[Written across face:] Past Due. Must be reported on by 10th.

New Form 204

PAYABLE AT COMPANY'S OFFICE — PLEASE SEND BILL WITH REMITTANCE

TELEPHONE BUILDING, 7th AND LOUISIANA STS., LITTLE ROCK

DISCOUNT OF 50 CTS. ALLOWED IF PAID ON OR BEFORE THE 15th

OFFICE HOURS, 8:30 A. M. TO 5:30 P. M.

ADVISE BY MAIL CHANGES IN NAME AND LOCATION FOR NEXT ISSUE OF DIRECTORY

O DEBITS TO 1950

Danaher M. J.

Paid June 4. 1908

Rental of Telephone and Lines with Exchange service payable in advance as per contract. — S.W. Tel & T. Co. — 2 75

T & T

TOLL CHARGES for previous month as per detail below ..... $

Rental Bal

Toll Bal

TOLL, as per bill rendered, $

NEXT, as per bill rendered, $

Paid in Cash, - $	2	25
Paid in Franks, $		

TOTAL	2	75
LESS DISCOUNT		50
NET AMOUNT PAID	2	25

New Form No. 206

SPECIAL RECEIPT

Received from Danaher M. J.

Tel. No. 1950 — 2022 Izard

Credit on account of ..... bill amounting to $ ..... $

Rental $ 2 75 — Toll $ ..... $ 2 75

Credit on Act

Dsd 50

Paid July 19. 1908

S.W. Tel. T. Co.

Sowell

Paid in cash

Paid in Bank 2 25 $ 2 25

New Form 204

PAYABLE AT COMPANY'S OFFICE — PLEASE SEND BILL WITH REMITTANCE

TELEPHONE BUILDING, 7th AND LOUISIANA STS., LITTLE ROCK

DISCOUNT OF 50 CTS. ALLOWED IF PAID ON OR BEFORE THE 15th

OFFICE HOURS, 8:30 A. M. TO 5:30 P. M.

ADVISE BY MAIL CHANGES IN NAME AND LOCATION FOR NEXT ISSUE OF DIRECTORY

O DEBITS TO 1950

Danaher M. J. 2022 Izard

Paid Aug 10. 1908

Rental of Telephone and Lines with Exchange service payable in advance as per contract. — S.W. Tel & Tel Co — $.

TOLL CHARGES for previous month as per detail below ..... $

Rental Bal

Toll Bal Paid on Act

TOLL, as per bill rendered, $

NEXT, as per bill rendered, $ 2 25

Paid in Cash, - $	2	25
Paid in Franks, $		

TOTAL		
LESS DISCOUNT		
NET AMOUNT PAID	2	25

New Form 204

PAYABLE AT COMPANY'S OFFICE
TELEPHONE BUILDING, 7th AND LOUISIANA STS., LITTLE ROCK

PLEASE SEND BILL WITH REMITTANCE

DISCOUNT OF 50 CTS. ALLOWED IF PAID ON OR BEFORE THE 15th

OFFICE HOURS, 8:30 A. M. TO 5:30 P. M.

O DEBITS TO 1950

Mrs. M. J. Danaher
2022 Byard
Paid Sep. 14. 1908
$4.35 Bal. 7 Les

Rental of Telephone and Lines with Exchange service payable in advance as per contract. }

TOLL CHARGES for previous month as per detail below

Rental Bal

Toll Bal

Paid in Cash, - $ 2 25

Paid in Franks, $

Addition acct	$ 2 75
TOLL, as per bill rendered,	$
RENT, as per bill rendered,	$
TOTAL	2 75
LESS DISCOUNT	50
NET AMOUNT PAID	2 25

ADVISE BY MAIL CHANGES IN NAME AND LOCATION FOR NEXT ISSUE OF DIRECTORY

New Form 204

PAYABLE AT COMPANY'S OFFICE
TELEPHONE BUILDING, 7th AND LOUISIANA STS., LITTLE ROCK

PLEASE SEND BILL WITH REMITTANCE

DISCOUNT OF 50 CTS. ALLOWED IF PAID ON OR BEFORE THE 15th

OFFICE HOURS, 8:30 A. M. TO 5:30 P. M.

O DEBITS TO 1950

M. J. Danaher
Paid Oct 3. 1908
$4. Tel. 2 Les
C.K.J.

Rental of Telephone and Lines with Exchange service payable in advance as per contract. }

TOLL CHARGES for previous month as per detail below

Rental Bal

Toll Bal

Paid in Cash, - $ 2 25

Paid in Franks, $

Due Months Rent	$ 2 75
TOLL, as per bill rendered,	$
RENT, as per bill rendered,	$
TOTAL	2 75
LESS DISCOUNT	50
NET AMOUNT PAID	2 25

ADVISE BY MAIL CHANGES IN NAME AND LOCATION FOR NEXT ISSUE OF DIRECTORY

New Form 204

PAYABLE AT COMPANY'S OFFICE
TELEPHONE BUILDING, 7th AND LOUISIANA STS., LITTLE ROCK

PLEASE SEND BILL WITH REMITTANCE

DISCOUNT OF 50 CTS. ALLOWED IF PAID ON OR BEFORE THE 15th

OFFICE HOURS, 8:30 A. M. TO 5:30 P. M.

O DEBITS TO 1950

M. J. Danaher
Paid May 9. 1908
$4. Tel + Tel les

Rental of Telephone and Lines with Exchange service payable in advance as per contract. }

TOLL CHARGES for previous month as per detail below

Rental Bal

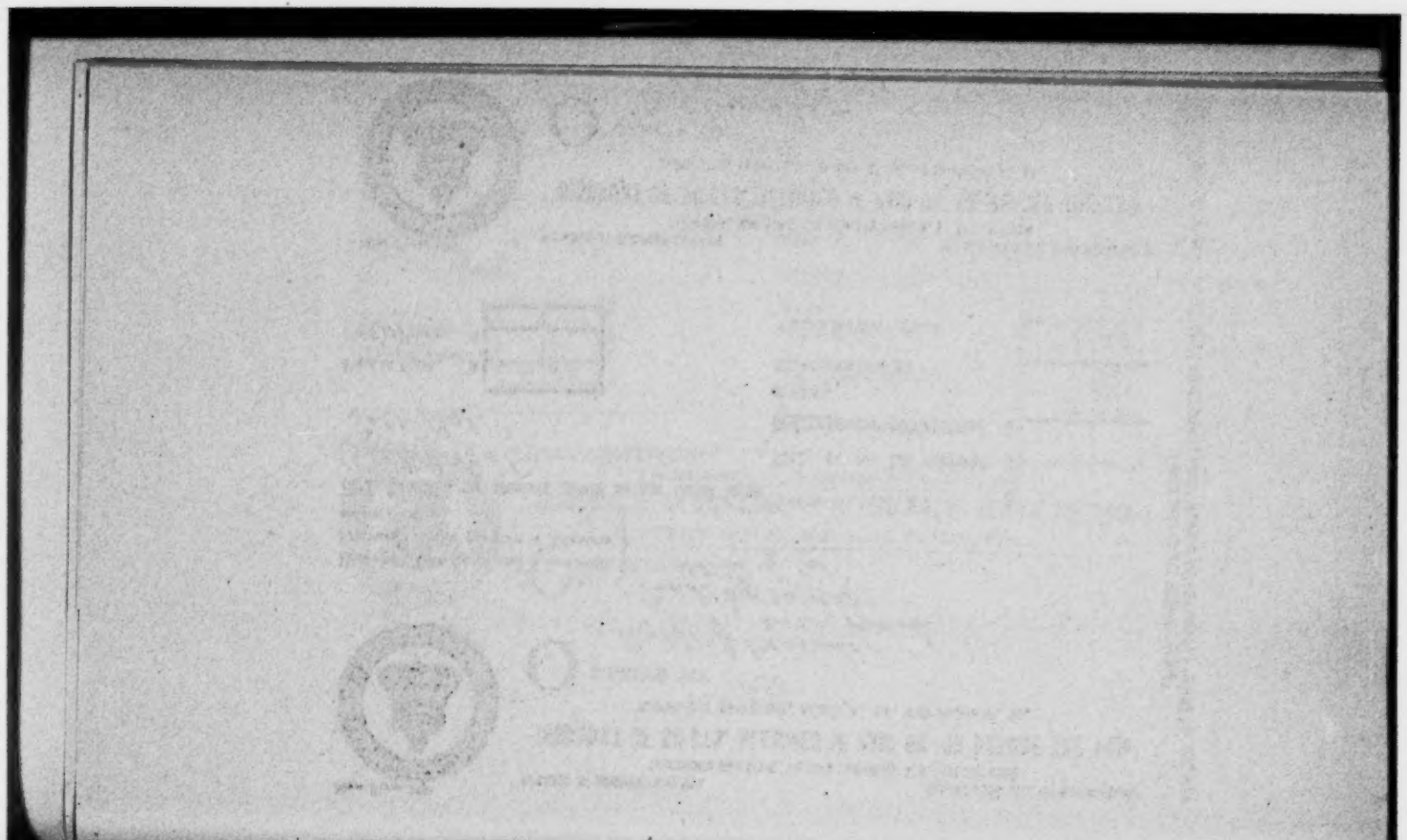
Toll Bal

Paid in Cash, - $

Paid in Franks, $

	$ 2 75
TOLL, as per bill rendered,	$
RENT, as per bill rendered,	$
TOTAL	2 75
LESS DISCOUNT	50
NET AMOUNT PAID	2 25

ADVISE BY MAIL CHANGES IN NAME AND LOCATION FOR NEXT ISSUE OF DIRECTORY



11.

2022 Izard.

No. 1267. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Feb.* 1, 1908.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance Due on Bills Previously Rendered	$4
To Rental of Telephone Instrument and Exchange Service Month Ending Feb. 29th	2
	6
2/12/08 by cash	2
Bal.	4

Received Payment for the Company.

W. C. McGUNN.

[Written across face:] Past Due. Must be reported on by 10th.

(Here follow receipts marked pp. 24 and 25.)

26 Q. When did the telephone company discontinue service on your phone?

A. On the 30th day of March.

Q. 1908?

A. Yes, sir, 1908.

Q. When was your telephone connected up again and you were allowed to use it?

A. On the 8th day of May, 1908.

Q. Do you know what time of day on the 8th day of May it was turned on and you were allowed to use it?

A. It was in the evening about two o'clock, I believe.

Q. It was cut off that morning before dinner, wasn't it?

A. Yes, sir.

Q. What efforts did you make during the time your phone was cut off to use the phone?

A. I tried it every day to see if I could get any answer, but I did not.

Q. You couldn't get any answer during that time?

A. No, sir.

Q. Do you know what time it was on the 30th of March that your phone was cut off?

A. I think it was in the afternoon.

Q. Did you- neighbors right around you have phones of this company in their houses during the time your phone was cut off?

A. They did.

Q. Were those phones in service during this time?

A. They were.

27 Q. When did you first hear or learn, what month was it, that they claimed your bills were unpaid for?

A. Well, it was a very recent thing they told me.

Q. Did they ever render you any bill showing what month you were due for?

A. They never did.

Q. When these bills were paid by you, the bills which have been shown you, Mrs. Danaher, did you make any application of the payment? In other words, did you tell the collector, or whoever collected it, what time you were paying for?

A. I told him for the present month.

Q. In every instance?

A. Yes, sir.

Q. Who paid all the bills to the telephone company from your house?

A. I did when they came to the house, but my daughter did when it was carried to the office.

Q. Your daughter is Miss Lulu Babb Danaher?

A. Yes, sir.

Q. Mrs. Danaher, I don't know whether I got it clearly before the jury or not as to what happened between you and the collectors when they presented these bills about making the corrections, tell the jury what there was about that, if any promise was

made to you by any agent of the company, or collector, about having the bill adjusted?

A. Well, when I would tell them I didn't owe it they would say, some of them would say, that they would see that it was taken off and have it made right.

28 Q. Do you have any recollection of how many times that happened?

A. Well, a good many times.

Q. You don't know how many?

A. No, sir. I would always try to impress it on them that I didn't owe it and wasn't going to pay it because I didn't owe it.

Q. They did present you those bills that we have shown you with no balance on them, after these conversations?

A. Yes sir.

Mr. TERRY: I want to except to the testimony as to the collector promising to knock off that $4.00 on the ground that the collector didn't have any right or authority to give her $4.00 of the company's money, nor to promise her that.

The COURT: I think the promise, so far as that is concerned, would not be binding upon the company if they didn't have the right to give it away, but it shows the transaction she had with the company; she couldn't speak to a corporation, she had to speak to the agent. It is a circumstance tending to show whether or not the company itself had information as to her claims and of course if she hadn't paid it the company was not bound by any promise.

Cross-examination.

By Mr. W. J. TERRY:

Q. Mrs. Danaher, you have produced bills here commencing back in September, 1907, showing a balance of two dollars, four dollars, and in full in some cases. The September bill, I think, showed a balance of two dollars, the total bill $4.00, balance due $2.00 and bill for the current month $2.00, leaving a balance of $2.00;

29 October shows the same; November shows a balance of $4.00, total $6.00, current month $2.00, balance $4.00. December, 1907, comes in with simply a $2.00 item, no balance appearing. January, 1908, shows a balance of $4.00; February the same and March the same. Now where are the bills that the company rendered you prior to September, 1907?

A. We are not supposed to keep our bills three or four years.

Q. You kept these back to September, 1907. It wasn't three years from September, 1907, to the time you brought this suit in 1908, it wasn't quite a year; you brought this suit on the 30th of May, 1908, did you have any receipts for March, April and May, 1907, and June, July and August?

A. Yes, sir, but when we pay our bills regular we are not supposed to keep our receipts because we don't think we will ever have any use for them.

Q. Where are your receipts back of this September receipt?

A. I don't know.
Q. Can you find thm?
A. No, sir.
Q. Have you made any effort to find them?
A. Yes, sir.
Q. How recently have you endeavored to find them?
A. Not recently. I always destroy my receipts when I pay my bills.
Q. Just as soon as you pay them?
A. No, not as soon as I pay them. These bills you are asking for were in 1907.
Q. You brought some in 1907. I am asking for the August, July, June, May, April and March bills, 1907, you say you haven't any of those?
30 A. I say I did have them but I haven't got them now.
Q. When did you look for them?
A. I told you I destroy my bills when I pay them, usually in a year's time.
Q. You didn't destroy these?
A. It was just accident I had those.
Q. You have kept every one of those from September right straight on down—what place do you usually keep your bills, generally, Mrs. Danaher?
A. Keep them in a desk.
Q. Did you have a box or portfolio or any *respectacle* of any kind to put them in in the desk?
A. No, sir.
Q. Have a pigeon-hole in the desk for them?
A. Yes, sir, I had a pigeon-hole.
Q. You keep bills a short while and then destroy them?
A. Yes, sir.
Q. How long has the company and you had this difference of opinion as to whether or not you owed them this bill, how many months prior to the time they cut the phone out?
A. I don't know what time they are suing for.
Q. Prior to the time your telephone was cut out, how many months had you and the company squabbled over the question as to whether or not you owed any back balance, you said these collectors came out there repeatedly?
A. I don't know how long it has been.
Q. Had it gone over one month, more than one month?
A. You mean at the first, when they first presented these bills?
Q. Yes.
31 A. It went on all the time.
Q. Beginning when?
A. I don't know.
Q. Don't know how far back it began in 1907?
A. No, sir.
Q. Did it begin prior to September, 1907, when this bill is produced here?
A. Yes, sir; of course.

Q. It began prior to September, 1907?
A. But I don't know what month they claim.
Q. You don't know how many months they claim?
A. No, sir.
Q. Do you remember Mr. Jeffries calling there on the 30th of March, 1907, with a bill showing a balance of $4.00, two dollars for the month of March, you then told him you had paid January and February, 1907, and had the receipts; he credited you on that account with $2.00 and you told him you would look up the receipts, that you didn't have time right then to find them
A. My daughter looked after that.
Q. Do you remember this visit as early as March, 1907?
A. No, I don't. I didn't know the collectors.
Q. Do you remember that anyone called about that time and asked to see the receipts, when you told him you had them, and you promised to look them up, that you didn't have time right then to do it?
A. No, sir; I don't remember them asking me for receipts then.
Q. When do you remember them asking you for receipts?
A. Just before they took the phone out; they sent a man
32 there and he wanted the phone or the receipts one.
Q. That was in March, 1908?
A. Yes, sir.
Q. Is that the first time you knew anything about those receipts?
A. Well, they might have asked me in the beginning. I told them I had them and wasn't going to pay them over again.
Q. They might have asked you in the beginning and you said you had them and wouldn't pay them over again?
A. No, sir.
Q. When the man came out to get that telephone in March, 1908, you declined to let him have it?
A. Yes, sir, because I had paid for it and it was mine.
Q. He went away without the phone, of course?
A. Yes, sir.
Q. You say each time you made those payments you directed that they be credited on the current month, when did you begin that, Mrs. Danaher, when was it you directed them to apply the payment you tendered on that particular month?
A. I did it all of the time.
Q. Always did that?
A. Yes, sir, I was paying for that month.
Q. How many years did that extend back, how long did that go on?
A. I don't know.
Q. You always did that, told them you were paying for that month?
A. Yes, sir, I was paying for that, of course, because I had paid the back months.
33 Q. Did you ever let a month pass over?
A. No, sir.
Q. Always paid the current month?

A. Yes, sir, I always paid in advance.
Q. Without exception?
A. Yes, sir.
Q. You haven't any receipts except the ones you brought here?
A. No, sir.
Q. This first one you produced here is paid on the 21st day of September, do you call that paying in advance?
A. It is in advance, the time the collector brings it.
Q. In other words you paid when the collector brought the bills?
A. Yes sir, and then usually in advance.
Q. Did you pay this bill on March 13, 1908 yourself, did you take the money down town to the office?
A. No.
Q. Do you know who paid that bill?
A. My daughter.
A. She paid that at the office did she?
A. Yes, sir.
Q. Well, how do you know she told them to apply the money that was paid them on the March bill?
A. She told me so.
Q. That is all you know about it?
A. That is evidence enough isn't it?
Q. It is enough for a mother, but it isn't enough in a court room.
A. If she is truthful——
34 Q. You were not present with her?
A. No, sir.
Q. How many of those bills, Mrs. Danaher, did you pay personally, at the office or elsewhere?
A. I paid those that the collector brought to my home.
Q. You paid the September bill, 1907, I suppose then? You paid all these bills that were presented to you at the house?
A. Yes, sir, if I was sick my daughter paid them.
Q. You might be absent, and your daughter then paid them?
A. I didn't say I paid all those myself, but they were paid either by myself or my daughter. Of course if I was in bed sick I wouldn't be expected to come to the door and pay it.
Q. Were you ever absent?
A. If I was absent my daughter would pay it.
Q. Can you look at those bills and see which ones you paid personally?
A. I don't think I can; that would be a hard thing to do. I don't think anybody could do that. Nevertheless they were paid. Why did the telephone company allow me to pay so long? Why didn't they shut it right off?
Q. You didn't make any of those payments at the office?
A. I did once.
Q. What month was that?
A. I don't remember.
Q. Was that after they cut your phone out?
A. No sir, my daughter paid them.
Q. You haven't paid at the office since your phone was cut out?

A. No sir, my daughter paid them.

35 Q. How long before your telephone was cut off did you make that payment at the office, what month and what year was it?

A. That I went to the office?

Q. That you went to the office personally?

A. I don't remember what month it was.

Q. You said awhile ago when you made those payments you directed them to apply the money on the current month, where did you direct them to do that?

A. Where?

Q. Yes.

A. I don't know what you mean.

Q. Where were you when you gave them those directions?

A. I was at home.

Q. Was that when you would pay these bills?

A. Yes sir, the manager didn't come out for me to direct him in person.

Q. But the bill collector who had the bill, you directed him to apply it on the current month did you?

A. Yes, sir.

Q. He receipted that bill and handed it back to you in that shape did he?

A. Yes, sir.

Q. You accepted it receipted in that way?

A. Yes, sir.

Q. Mrs. Danaher, did you pay the bill personally in December, 1906?

A. I couldn't tell you.

Q. Do you know whether you paid it at the office or at the residence?

36 A. I don't know, but I know it was paid.

Q. Did you pay the bill personally in January 1907?

A. I cannot remember those things because it is too far back.

Q. You say you know those bills were paid?

A. Yes, sir.

Q. Were you present every time?

A. If I wasn't in the house my daughter would tell me that she paid them.

Q. If you wer-n't in the house you wer-n't present?

A. Of course not.

Q. Were you always present when those bills were paid?

A. I say I don't think I was.

Q. Do you remember the time and place that you paid your bill for December 1906?

A. No, sir, I do not remember.

Q. Do you remember the time and place when you or your daughter, or anybody else, paid the bill in December 1906?

A. I know it was always paid because she would tell me.

Q. Do you remember the time and place when she paid this bill?

A. No, sir.

Q. Do you remember the time and place when the January bill was paid?

A. No, sir; I don't know when any of those bills a way back there were paid because it has been so long, but I know I always paid the bills.

Q. Do you remember when and where the bill for February 1907 was paid?

A. No, sir.

37 Q. Do you remember when and where the bill for March 1907 was paid?

A. I took so little notice of the time, just saw the bill, I would hardly take any notice of the exact time it was.

Q. Then how do you know you did actually pay the bills?

A. Because I pay my bills. I pay all my bills.

Q. Because you are prompt in paying generally?

A. Yes sir, I know I paid them because the telephone company wouldn't let me keep the phone in the house unless I did pay.

Q. They did allow you?

A. Why did they?

Q. You say the telephone company wouldn't allow you to have the phone unless you paid the bill?

A. No, sir.

Q. How did you know that?

A. It is according to nature.

Q. Do you know whether it is their rule to require you to pay?

A. It is their rule to take the phone out if you don't pay.

Q. You suppose that is the rule?

A. That is the rule.

Q. How long have you known that to be the rule?

A. I have known it ever since I had a phone.

Q. You had a contract with the telephone company to put the phone in there?

A. Yes sir, It took them a year to get it in.

Q. You have the contract haven't you?

A. I don't know whether I have it or not.

Q. At any rate you knew the company required payment

38 or they would take the phone out?

A. Yes, sir, that is why I paid, that is one reason; another reason is I always pay my debts.

Q. You say you have never let a month's bill run over?

A. No, sir.

Q. Mrs. Danaher, isn't it a fact that you utterly failed to pay your June bill and that on July 15th, 1907, you paid $4.00 for two months?

A. What does that signify?

Q. It signifies that you didn't pay your bills every month as you say you have.

A. Didn't I?

Q. I am asking you the question, if you paid your bill for June 1907 in June 1907, or if you didn't allow that bill to run on until July 15th, when you paid it?

A. I don't remember letting it run over, but I know I paid it.
Q. Did you allow it to run over from June to July before you paid it?
A. I don't remember that.
Q. Could that have happened?
A. Of course it could have happened, but then if it did happen it was paid in July, you say?
Q. If it did happen it would be paid in July?
A. Yes, sir.
Q. If you let your June account run couldn't you just as well have let your January account run over?
A. Yes, sir; then I could pay it.
Q. Your belief that you paid for those back months is because of the fact that you pay your bills promptly as a rule?
39 A. Yes sir, then I remember I kept up my payments with the telephone company.
Q. You don't remember that you paid June 1907?
A. I told you I didn't remember the exact date I paid those bills.
Q. But you remember you paid it in the month of June 1907?
A. No sir.
Q. You have stated already there were months, more than one month that you didn't pay it at all, that your daughter paid it?
A. That is the same thing; it was paid.
Q. When she paid it you didn't see it done?
A. I know it was done, she is a truthful girl.
Q. Whe- she paid it you didn't see it to know of your own knowledge——
A. I knew it when she came home.
Q. You knew it from her telling you so?
A. She brought home the receipt and told me she had paid it.
Q. By bringing you those receipts?
A. When it was paid at the office she paid it.
Q. Can you look at these receipts, or in any other way tell which month you paid and which month your daughter paid the telephone company?
A. No sir, I cannot.
Q. Can you tell by looking at the receipts, or in any other way who paid the bill in January 1907?
A. You know I told you I couldn't tell so far back.
Q. You couldn't tell who paid it in February 1907?
A. I couldn't tell in any of those months.
40 Q. Can you tell you paid it in January 1908?
A. No sir.
Q. Can you tell who paid it in January 1907?
A. No sir.
Q. Can you tell who paid it in January 1909?
A. I don't remember who paid that month or any month only when the bills came to the house I paid them unless I was sick.
Q. Can you tell who paid the bill last month?
A. My daughter paid it last month.
Q. Can you tell who paid the bill in February this year?

A. Ever since you have to go to the office to pay my daughter has paid them.

Q. I thought you said you paid at the office one time?

A. It has been some time ago that I paid it. I paid just once at the office.

Q. How long ago was that?

A. I don't remember.

Q. Know what month it was?

A. No sir.

Q. Know what year it was?

Q. No, I don't even remember what year it was.

Redirect examination.

By Mr. DANAHER:

Q. Were you in Little Rock in the summer of 1907, from June up to the 1st of September?

A. No sir.

Q. Where were you?

41 A. I was in Michigan.

Q. Who attended to the payment of your bills and such matters during such time?

A. Mr. Walker Danaher.

Q. Mr. Terry has asked you about some man coming out there and asking for receipts, when was it that that happened?

A. Just before they took the phone out.

Q. The same day?

A. I think it was the same day.

Q. Was it the same man at the same time that he came to take out the phone?

A. Yes sir.

Recross-examination.

By Mr. TERRY:

Q. What did you say to that man when he asked you for the receipt?

A. I told him he wouldn't get the receipt or the phone either one.

Q. You told him he wouldn't get the receipt or the phone either?

A. No sir, that I was paying for the phone and it was mine as long as I paid for it.

Q. What time in June 1907 did you leave the city?

A. I don't remember.

Q. Did you leave in June?

A. It was either the latter part of June or the 1st of July.

Q. The latter part of June or the 1st of July. Until you

42 left who was paying your telephone bills and other bills?

A. I was paying them myself.

And further deponent saith not.

Testimony of Miss Lula Babb Danaher.

43 Miss LULA BABB DANAHER, the next witness introduced on behalf of the plaintiff, being first duly swo-n, testified as follows:

Direct examination.

By Mr. DANAHER:

Q. Are you the daughter of Mrs. Adelia P. Danaher, the plaintiff in this case?
A. I am.
Q. Where do you live?
A. 2022 Izard Street.
Q. Same home with your mother?
A. Yes sir.
Q. How long have you been living there, for the last four or five years?
A. Yes sir.
Q. I hand you a bunch of telephone receipts commencing with September 1st, 1907 and ending November 9th, 1908, can you look at those receipts and say which ones of those bills you paid?
A. I paid all that was paid at the office.
Q. When did you commence going to the office, when did they quit sending a collector around?
A. I think it was March.
Q. March of what year?
A. 1908.
Q. You paid for March 1908 and every month since then?
A. Yes sir.
Q. Are those the receipts you received?
A. Yes, sir.
44 Q. I notice the bill for April 1908 appears to have been paid on April 29th, 1908, I wish you would explain how that bill came to be paid so late in the month?
A. I went the first of April and they refused to take the money unless I paid the back bill.
Q. Did you offer them the money at that time?
A. Yes sir, they refused to give the discount and I wouldn't pay the regular bill because it was the first of the month.
Q. They refused to give you the discount?
A. Yes sir.
Q. What is the discount?
A. Fifty cents.
Q. What do you get that discount for.

Mr. TERRY: Objected to. They are not charging discrimination because we refused to give them the discount.
The COURT: He is showing why it was paid so late in the month.

A. For paying before the fifteenth of the month.

Q. The fifteenth of the month?
A. Yes sir.
Q. When did that practice commence on the part of the telephone company?
A. I think it was in March.
Q. Can you tell from looking at the receipts?
A. I don't remember, I think it was near the 1st of April.
Q. The bill for March just shows a charge of two dollars for March, did they have that fifty cents discount when the charge was two dollars?
45 A. No sir.
Q. It was April when it commenced to be $2.75; they gave you fifty cents discount for paying before the fifteenth of the month?
A. Yes sir.
Q. You did go on the 1st of April?
A. About the 1st.
Q. And tendered them $2.25 and they refused to take it?
A. Yes sir.
Q. And on the 29th who paid this bill of $2.75?
A. Mother.
Q. That was sent out to the house was it?
A. Yes sir.
Q. At all times, commencing with March 1908 and coming on down to date, all those payments you say you have made at the office, did you make any application of the payments to any specific month?
A. I said I was paying for the month in advance, the current month.
Q. Did you get receipts showing those payments to be applied to any particular month?
A. No, they refused to give them to me for that month.
Q. They refused to issue receipts showing what month it was for?
A. Yes sir.
Q. Did that happen in each and every instance?
A. Yes sir.
Q. What do you know about the payment of telephone bills by Mrs. Danaher, or anyone for her, from the time the phone was installed at your home up to the present time, were the bills paid or not paid?
46 A. They were paid every month.
Q. When did you first learn what months were in controversy between the telephone company and Mrs. Danaher?
A. Not until the phone was turned off.
Q. How did you find out?
A. By asking at the office.
Q. What did they tell you?
A. January and February 1907.
Q. Who has had charge of looking after those telephone receipts and keeping them?
A. Well I have mostly.

Q. Have you made any search, or what search have you made, if any, to find any other back bills except those produced here?
A. I looked every place I could think of and couldn't find any.
Q. Couldn't find any but these?
A. I didn't find any.
Q. Where were you and your mother during the summer of 1907?
A. In Michigan.
Q. Do you remember what time you left Little Rock?
A. Left in July.
Q. When did you return?
A. September.
Q. I see these receipts commence with September 1st, could you locate any bills prior to the time you left for the summer?
A. No sir.
Q. After you returned you commenced to keep them?
A. Yes sir.

47 Q. Was the controversy then on between the telephone company and Mrs. Danaher about the back bills, when you returned?
A. Yes sir.
Q. Do you remember whether there was any claim made for it at the time you went off for the summer?
A. I think there was, but I don't remember.
Q. Do you know what month the controversy did commence?
A. No sir.
Q. Have you ever seen a bill rendered out there showing what month the balance is claimed to be due for?
A. No sir.
Q. Is there anybody else at your home to handle these bills besides you and your mother?
A. No sir.
Q. The first time your attention was called to the fact that the telephone company was claiming a back balance, did you make any search for receipts for several months previous?
A. Yes, sir.
Q. Did you find any of them at that time?
A. I remember finding the previous month's.
Q. You don't know what month that was though?
A. No sir.
Q. That bill I believe you say has been lost?
A. Yes sir.
Q. All the bills prior to your return home here in September?
A. Yes sir.
Q. I believe you used the word "bill" for the previous month, did you find any receipt showing that it had been paid?
A. Yes sir.

48 Cross-examination.

By Mr. TERRY:

Q. Did you show that receipt to any one at the telephone office?
A. No sir, they didn't ask for it.

Q. Did you call up at the office and tell them you had this receipt?
A. No sir.
Q. Do you know what month it covered?
A. I do not.
Q. Do you know what year, was it in 1907, was it the receipt you were looking for?
A. Yes sir. There was no controversy over it.
Q. I thought you said there was a controversy over it and that's why you went to look for it?
A. Mother asked me to see if she had paid last month's bill and I looked for it.
Q. That is when your mother asked you for it, it wasn't when the telephone company asked you for it?
A. They never asked me.
Q. When the telephone company asked you for the receipt for a certain month, you never did find the bill covering that month?
A. They never asked me.
Q. What month was it your mother asked you to look up that receipt?
A. I don't know.
Q. You found a receipt for one month?
A. One month previous.
Q. Didn't you find a receipt for two months?
A. I didn't look.
49 Q. If you didn't look you didn't find it?
A. No sir.
Q. Now then, on or about April 1st you went down to the office to pay your telephone bill?
A. Yes sir.
Q. The company declined to accept your money unless you would pay the back bill?
A. Yes sir.
Q. What back bill?
A. They didn't say, they just said unless the bill was paid up to date.
Q. Did they tell you what the amount of it was?
A. No sir.
Q. Did you ask for the amount of the bill?
A. No sir.
Q. You had received notice already through the mails as to the amount of your bill?
A. Not through the mail.
Q. How had you gotten notice that it would be taken out, if you didn't pay the bill?
A. Didn't get any notice.
Q. Didn't your mother get one?
A. No sir.
Q. Wasn't there one received at the house about the 23rd of March 1908?
A. I don't remember.
Q. You don't remember that?

A. No sir.

50 Q. I speak of the first notice sent in March when they notified you they would take the phone out, and when you went to pay them in April they declined to accept it unless you also paid the back bill, whatever it was?

A. Yes sir.

Q. They had already cut the telephone out?

A. Yes sir.

Q. Did they tell you when they cut it out that that was what it was for?

A. Yes sir.

Q. Did anybody call you up at your residence over the telephone, anybody from the office before it was cut out?

A. Not that I remember.

Q. You would remember it if you had answered the phone?

A. I think I would.

Q. If anybody had called you up and told you that the bill had to be paid or the phone would be disconnected?

A. Yes sir.

Q. You didn't get any such message as that?

A. No sir.

Q. Where were you when the man came to take out the phone?

A. I was at home.

Q. Had you been expecting him to come out there, or were you looking for any trouble of that kind?

A. No sir.

Q. You were perfectly surprised when he came there and wanted the phone?

A. Yes sir.

51 Q. And were perfectly surprised when he claimed you were owing the company some back money and for that reason wanted to take the phone out?

A. Yes sir.

Q. When he asked for those receipts that you said you had, what did you say to him?

A. Told him I didn't have them.

Q. What did your mother tell him?

A. I didn't hear her.

Q. You weren't present when she and he were talking?

A. I was present the first month he asked for the receipts.

Q. What month was that?

A. I don't know.

Q. How long prior to taking out the phone?

A. I don't know.

Q. It was before you went off for the summer?

A. I think so.

Q. You went off about the first of July 1907?

A. Yes sir.

Q. What kind of a looking man was it that asked you for the receipts prior to July 1907?

A. I don't know.

Q. Did he ask your mother for one month's or two month's receipts?

A. Just one month.

Q. Was that the months' receipt you afterwards found?

A. No, it was the month just before the one he asked for. It was the month before he came to collect the bill; I found the prior month to that.

Q. You didn't find the receipt that he was looking for?

52 A. I didn't know what one he was looking for.

Q. You didn't find the one he asked your mother for?

A. I don't think he specified any special month.

Q. Now you say when you paid these bills at the telephone company's office you asked them to apply payment on the current month?

A. Yes sir.

Q. I notice from the receipts that they didn't do it.

A. No sir.

Q. Why wouldn't they do it?

A. Said they couldn't.

Q. Declined to do it?

A. Yes sir.

Q. You paid the money and took the receipts in that shape?

A. Telling them that it was for the month in advance.

Q. They told you they couldn't accept it that way and would have to apply it on your account?

A. They said I was already two months in advance; why should I pay it so far in advance.

Q. You are talking about something that happened recently?

A. I am talking about when I went to the office to pay.

Q. So you were in advance all the while instead of in arrears?

A. So they said.

Q. Don't you know that after the 8th of May that the company decided to charge off this $4.00 rather than have litigation with your mother and in charging that off gave you credit for the $2.25 you had paid in April and May, which left a balance on their books to your credit, and that that is the credit they were talking about when you came down there in June or July to make those payments?

A. I don't know.

53 Q. You don't mean to say you had credit on the books April 1908?

A. That is what they said.

Q. Showed you this bill where you owed them $6.75 and yet said they were indebted to you?

A. They didn't show me the bill.

Q. You said you paid it?

A. Well I did.

Q. You didn't pay this bill in April 1908, your monther paid it at the house?

A. Yes sir.

Q. That bill shows $6.75 with $2.75 credit on it?

A. Yes sir.

Q. Then the company didn't claim they were owing you in April 1908 did they?
A. Not in April, in May.
Q. After Mr. Hughes had been out there to see your mother?
A. No sir, it was the 1st of May.
Q. You are sure of that?
A. Yes sir.
Q. Did you pay it on the 1st of May?
A. 1st or 2nd.
Q. Which was it?
A. It was about the 1st.
Q. On or about the 1st of May somebody at the office told you the company was indebted to you?
A. Yes sir.
Q. Do you remember when Mr. Hughes called to see your mother about the 8th of May?
A. Yes sir.
54 Q. You are sure of that?
A. Yes sir.
Q. How do you remember that so distinctly that it was prior to the 8th of May they told you they were owing you?
A. Because I always go the first of the month and pay the bill; the first of April and May I went.
Q. Wasn't it subsequent to that and in the month of June when they told you that?
A. No sir.
Q. How do you know it was in May, you know it was the first of the month because that was when you paid your bills?
A. I just remember it.
Q. You remember it was in May 1908?
A. Yes sir.
Q. Do you remember what day in June 1908 you went to the office? Do you remember what you did?
A. They said the same thing.
Q. What did they say in July?
A. For several months they said the same thing.
Q. You distinctly remember that they began saying this on the occasion of your visit in May 1908?
A. Yes sir.
Q. It wasn't later than the 2nd of May 1908?
A. No sir.
Q. Your receipt shows it was paid on the 2nd of May 1908?
A. Yes sir.
Q. You say your bills are always paid; who paid the bill in December 1906?
A. I suppose mother did.
55 Q. Who paid the bill in January, 1907?
A. All the bills paid at the house mother paid.
Q. Did you never pay any when she was sick or when she was away from the house?
A. Yes sir, when she was sick I did.

Q. Was she ever absent from the house when you were there?
A. No, not that I remember.
Q. But if she was absent you paid the bills?
A. Yes sir.
Q. Do you know who paid the bill in February 1907?
A. No sir.
Q. Do you know who paid the bill in March 1907?
A. Yes sir.
Q. Who paid that?
A. Mother.
Q. What time of the month did she pay it?
A. I don't know, it was the latter part.
Q. Was it the 30th of March?
A. I don't know.
Q. Anyhow it was the latter part of March wasn't it?
A. I don't remember.
Q. Didn't a young man come out there?
A. I don't remember.
Q. Where you there when she paid it?
A. I don't remember.
Q. Why do you think she paid it in the latter part of March?
A. I said I didn't remember when she paid it.
Q. About how many months before you went away, you and your mother, in 1907, was it that this controversy had come
56 up about these bills?
A. I don't know.
Q. It was some little time before that?
A. I don't know.
Q. You said awhile ago to Mr. Danaher that it was sometime before you left?
A. Yes sir, but I don't know how long.
Q. Can you approximate and say whether it was a week or a month?
A. I don't remember.
Q. About what time in July 1907 did you leave, Miss Danaher?
A. I think it was the last part.
Q. The last part of July?
A. I think. I don't exactly remember when.
Q. Wasn't it before the 4th of July?
A. I don't know.

Redirect examination.

By Mr. DANAHER:

Q. Something has been asked you about a notice sent by the telephone company that your phone would be discontinued, is that the notice received by Mrs. Danaher from the company?
A. Yes, sir.
Q. Was there any other notice but that one sent out there?
A. I never saw it.
Q. What is the date of that notice?

A. April 16th, 1908.
Q. What does the notice say?

57 Mr. TERRY: I object to that; it is after the phone was cut out.

Q. Is that the envelope that notice came in?
A. Yes sir.

(Notice and envelope introduced in evidence.)
Mr. TERRY: I object to the introduction.
The COURT: The objection is overruled.
To which action of the Court the defendant at the time excepted and asked that its exceptions be duly noted of record.
The notice is as follows:

The Southwestern Telegraph & Telephone Co.

10. OFFICE, *Apr.* 16, 1908.

Notice.

Danaher, M. S., 2022 Izard St., City.

DEAR SIR: Your bill for rental of telephone to Apr. 30, 1908 amounting to $6.75 is still unpaid. We trust that you will settle this at our office on or before Apr. 26, 1908, otherwise we shall be compelled to cancel our contract with you and discontinue service.

Yours truly,

L. M. LORING, *Manager.*
P.

Post mark on envelope "Little Rock, Apr. 19-7:30 p. m."

Q. Was the telephone discontinued before or after the date of this notice?
A. Before.
Q. It had already been cut off when the notice was sent?
58 A. Yes sir.
Q. To your knowledge was any controversy ever made, or any claim made by the telephone company for any back bills, further than the appearance of the item on the bills?
A. No sir.
Q. At any time, when you paid them, prior to the time when you were at the office and they refused to take your money, did any collector ever insist on the payment of the back bills?
A. No sir.

Recross-examination.

By Mr. TERRY:

Q. I believe you stated you didn't pay at the residence, that they were paid by your mother as a rule?
A. Mostly.

Q. You only paid at the residence when your mother was sick?
A. Yes sir.
Q. You don't know what took place between your mother and collector?
A. Sometimes I did.
Q. But you do know that prior to your going away for the summer there was a controversy about a back bill?
A. Yes sir.
Q. You don't know how long that had lasted before you left?
A. No sir.

And further deponent saith not.

59 *Testimony of Geo. W. Hughes.*

Mr. GEORGE HUGHES, the next witness introduced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. DANAHER:

Q. In what business were you engaged, Mr. Hughes, in March, April and May of 1908?
A. I was with the Southwestern Telegraph & Telephone Company in the capacity of solicitor and contracting agent.
Q. At what place?
A. Little Rock.
Q. Were they furnishing telephone service during those months to the residents of Little Rock, generally?
A. Yes sir.
Q. Do you remember what the charges for telephone services were at residences during the month of March 1908?
A. They were $2.75, with the usual discount of fifty cents allowed if paid on or before a certain date.
Q. What was that certain date?
A. I believe it was the 10th of the month.
Q. Are you sure that commenced in March or was it in April that those changes commenced?
A. I am not positive whether it was March or April, since you recall it, but I am inclined to believe it was April.
Q. What was the charge prior to that?
A. Two dollars a month.
Q. Did they charge the same rate to all the *resident* phones?
A. Yes sir.
60 Q. During those months?
A. Yes sir.
Q. Could you tell what the charges were during those months by reference to some of the receipts for those months?
A. Yes sir.
Q. Look at those receipts for March, April and May, those three right there, and see?
A. Yes, this is at the rate of two dollars a month here.

Q. What month was that for?
A. Rendered on March 31st——
Q. That was for the month of March, two dollars.
A. Yes sir.
Q. And the subsequent bills were $2.75?
A. The subsequent bills?
Q. I am talking about the charge per month?
A. The charge for the month subsequent to this was $2.75.
Q. What was it for April and May?
A. $2.75 with the discount of fifty cents if paid on or before the 10th.
Q. Was the company installing new phones in residences during the months of March, April and May?
A. Yes sir, we install phones all through the month at any time as requested and as occasion demands.
Q. You did it during those months?
A. I presume so. It is a matter I didn't keep track of but I suppose they did; they do it every month or along during the month.
Q. You were taking contracts for them at that time?
A. Yes sir.
61 Q. Was the plant in running order during those months?
A. Yes sir.
Q. And able to serve telephones that had already been installed?
A. Yes sir.
Q. Were they serving telephones that had already been installed during those months?
A. Yes sir, except probably in some instances where they were delinquent or something like that.
Q. Where they had cut them out for some reason or other?
A. Where they had cut them out.
Q. People whose bills were paid up and who were complying with their rules and regulations, they were furnished service were they?
A. Yes sir.

And further deponent saith not.

Plaintiff rests.

Whereupon the defendant company introduced the following testimony, to-wit:

62 *Testimony of Chas. A. Vedder.*

Mr. CHARLES A. VEDDER, the first witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TERRY:

Q. Your name is Charles A. Vedder?
A. Yes sir.

Q. What position did you hold with The Southwester- Telegraph & Telephone Company in 1907?

A. Bookkeeper.

Q. In 1907?

A. In 1907, yes sir, commencing September.

Q. Prior to that time what position did you hold with the telephone company?

A. I never held any position with the company prior to that time.

Q. Prior to 1907?

A. Prior to September 1907?

Q. I will ask you to take this book and turn to Mrs. Danaher's account and state to the court and jury what the books show?

A. This book begins January 1, 1907; account 1207, telephone No. 1950, 2022 Izard, route 11; the rate was $24.00 a year; two dollars a month, that was the charge for January—this column in here is for the credits; this two dollars in red is the $2.00 brought forward from the previous month, and two dollars, the current charge for February.

Q. Making a total of what?

A. A total of $4.00 due the last day of February. There is no credit for the months of January or February; on the 30th
63 day of March $2.00 paid.

Q. What was brought forward to March?

A. $4.00.

Q. What kind of ink?

A. Red ink. On the 30th day of March credit of $2.00, which would be $4.00 brought forward in April, and $2.00 charge for April.

Q. With $4.00 brought forward that would make it $6.00 due in April?

A. Yes sir. On the 22nd day of April $2.00 credit; $4.00 brought forward to the 1st of May; on the 9th of May $2.00 credit and $4.00 brought forward to the 1st day of June; $2.00 for the month of June and no credit for the month of June leaves $6.00 balance; on the 15th day of July a credit of $4.00 leaving a balance of $4.00 on that date. In August, the 1st day of August $4.00 balance brought forward, $2.00 charge for the month of August; on the 9th of August $2.00 credit; on the 1st day of September $4.00 balance brought forward, $2.00 charge for September with a credit on the 21st of September of $2.00. In October $4.00 brought forward, $2.00 charge total of $6.00; on the 4th of October a credit of $2.00. On November 1st balance of $4.00 brought forward, $2.00 charge making $6.00 due; on the 13th of November credit for $2.00. In December $4.00 balance brought forward, $2.00 charge for December.

Q. That made a total of $6.00?

A. Yes sir. The 6th day of December a credit of $2.00. January $4.00 balance brought forward, $2.00 charge for January would make a total due of $6.00; on the 18th of January a credit of $2.00. February 1st, 1908, balance brought forward $4.00, $2.00 charge

for February, total of $6.00. On the 12th day of February
64 credit for $2.00. Mr. Adams, the auditor, then transferred the account to another ledger.

Q. What month was that?
A. February.
Q. Have you that other ledger?
A. No sir, it isn't here.
Q. Where is it?
A. At the office.

Cross-examination.

By Mr. WILLIAMS:

Q. You didn't make this record?
A. I commenced in September.
Q. You don't know anything about it previous to September except what you have found here?
A. Only what is given on the books.
Q. You didn't make these entries?
A. Not until September; after September 1st I did.
Q. Were you in the office at any time when any payments were made on this account?
A. Yes sir.
Q. Did you ever present the account out at the residence?
A. No sir.
Q. When was the first time your attention was called to this matter in the office by payments or otherwise?
A. The payment of March 1908, I believe. Mrs. Danaher came to the window and asked to pay her bill—the collector usually called on Mrs. Danaher—and being the bookkeeper I made up a special bill of $4.00 balance due and $2.00 charge for March which
65 would make a total of $6.00. She made the remark "she didn't owe $6.00 and had receipts to show that" so she paid $2.00 and I gave her a receipt by cash $2.00, leaving a balance of $4.00. I took the account and made a memorandum and gave it to Mr. Jeffrey.
Q. Who was it came to the office at that time?
A. The lady's name was Mrs. Danaher.
Q. Was she a young lady or an old lady?
A. She was an oldish lady.
Q. Did she direct you, when she made that payment, as to how you should apply payment?
A. No sir.
Q. State what she said?
A. She said she didn't owe $4.00 balance, that she had receipts.
Q. What was said about receipts?
A. I told her I would like to see the receipts if she would bring them down.
Q. What did she say?
A. I don't remember what she did say about bringing them down.

Q. Did she say anything to you about charging it on the current month?

A. No sir.

Q. Did you credit it on the current month?

A. No sir.

Q. I show you this receipt of March 13, 1908, who issued that receipt?

A. That is my receipt.

Q. Is that your handwriting?

A. Yes sir.

66 Q. You say it was an elderly lady who said her name was Mrs. Danaher?

A. Yes sir.

Q. Did she look like this lady here?

A. I couldn't say.

Q. It was not a young lady?

A. It was not a young lady.

Q. Were there any other payments made to you on this account?

A. No sir.

(By Mr. Ed Williams:)

Q. You were there from September, 1907?

A. Yes sir.

Q. You don't know anything that transpired or took place prior to that time?

A. No sir.

Q. What was your custom or the custom you found in vogue at the office about collecting the bills at the time you went in as bookkeeper?

A. At the time I went in as bookkeeper it was about the time the auditor was getting the books ready preparatory to transfer-ing them to another ledger. Our custom was that anyone who owed for over a month, we would make up a statement, this statement was handed to the cashier who investigated it and sent notices.

Q. How did you collect your current bills, that is what I want to know?

A. After the bills were made up and the balance was put on there was a charge for the current month, the bills were routed and given to the collectors, except those bills that were by special request mailed out, or those held at the office by special request.

Q. You made up bills showing the amount of indebtedness 67 for the rental of telephones, including the current month, and put them in the hands of collectors?

A. With the balance on, whatever the balance was.

Q. You always did that?

A. Yes sir.

Q. So far as those entries are concerned you simply entered what the collector had reported to you as his collections?

A. Yes sir, what the collector reported.

Q. You delivered the Danaher bill, he brought back two dollars

and handed that in as the Danaher collection, you entered it as two dollars credit?

A. Yes sir.

Q. You would know nothing about whether the party making the payment had designated or stated whether that was the payment for the current month or not?

A. Not if the collector didn't tell me.

Q. All you know is, he would simply report two dollars collected on a certain bill?

A. Yes sir.

Q. You simply entered it there as two dollars paid?

A. Yes sir, two dollars paid.

Q. And in that manner make your corrections—if you had the bills there of course the bills still remain unpaid?

A. Yes sir.

Q. Isn't it a fact that your record there shows continuously through, with the exception of the month of July, that this party was paying the amount of the current month's rent continuously month after month?

A. From the 1st of January?

68 Q. From the 1st of March?

A. Yes sir from the 1st of March.

Q. That is a fact?

A. Except that July balance, yes sir.

Q. With that exception the payments were just exactly what the payments for the current month would be?

A. Yes sir.

Q. When was it you say she came to see you?

A. The receipt shows the 13th of March, 1908.

Q. What did Mrs. Danaher want to pay you when she came there?

A. She wanted to pay her bill. I made up a bill for her with the $4.00 balance and $2.00 charge for the current month of March.

Q. Didn't she at that time tell you she didn't owe that balance?

A. Yes sir.

Q. And that she wanted to pay the $2.00 for the current month?

A. She did not.

Q. What did she want to pay?

A. She wanted to pay $2.00.

Q. That is all she wanted to pay?

A. Yes sir.

Q. If she didn't want to pay but two dollars and disputed the balance, then that two dollars was for the current month?

A. No sir.

Q. How could it be anything else?

A. The March bill showed $6.00.

Q. But part of it she said she didn't owe?

A. Yes sir.

Q. She wanted to pay the two dollars; if she was willing

69 and offered to pay two dollars and disputed the four dollar balance, what else could she have been desiring to pay except for the current month?

A. Pay two dollars on account.
Q. She wanted to pay two dollars on account?
A. That is what she did pay.
Q. If she disputed the four dollar balance and wanted to pay two dollars she was wanting to apply the two dollars on that four?
A. That is what she did.
Q. Is that what she did or what you did?
A. That is what she did.
Q. Did she tell you to credit it on the old account?
A. I credited her by cash two dollars on account.
Q. Did she direct you *you* to put it on the old account?
A. No sir.
Q. She paid the two dollars?
A. Yes sir.
Q. Told you she didn't owe four dollars?
A. Yes sir.
Q. Where did you enter the credit?
A. I entered credit as two dollars on account.
Q. You entered it where?
A. I didn't enter it on the other ledger.
Q. Wherever it was entered it was entered on the month it was paid?
A. Yes sir.
Q. No credit back to those blank months?
A. No sir.
Q. She didn't direct you to credit it on any old account?
70 A. No sir.
Q. She disputed the old account?
A. She said she had receipts?
Q. She said she didn't owe it?
A. Said she had receipts.
Q. Didn't she say she didn't owe it?
A. Yes sir.
Q. If she disputed owing the account she wouldn't pay and did pay the exact amount of the current bill—two dollars wasn't it?
—. ——.
Q. Then the amount she did pay was exactly the amount of the current month?
A. Two dollars, yes sir.
Q. You just simply put it on your books as credit?
A. Credit two dollars on account.
Q. You just simply entered credit income two dollars?
A. Two dollars.
Q. Just as it shows on these other accounts?
A. Yes sir, the receipt shows by cash two dollars.
Q. Did you write that yourself?
A. Yes sir.
Q. That is your writing is it?
A. Yes sir, balance four dollars.
Q. Did you make out the bills in 1907 after you went there?
A. I helped make them out in September and from September on.

Q. Did you make them out any month after that?
A. After 1907?
Q. Yes?
A. I believe I helped make them out in January and I believe in February I helped make them.
71 Q. Did you make any out in 1907?
A. Commencing with September I believe I helped make them out.
Q. You claim there was four dollars balance due commencing with March, 1907, I believe?
A. Four dollars balance commencing March, 1907.
Q. Does that continue to run all the way through there?
A. As four dollars?
Q. Yes.
A. It continues to run as four dollars to the 1st day of July when it was six dollars, adding the June payment.
Q. But never less than four dollars?
A. No, sir.
Q. Please examine the bill that was rendered September 30th and state, if that were true, why you rendered a bill for a balance of two dollars, and two dollars for the current month of September?
A. I didn't make that bill out.
Q. You said you were making out the bills?
A. I said I helped make the bills.
Q. Weren't they supposed to have been from your books?
A. Yes, sir, from this book.
Q. It is a fact this bill only shows a balance of $2.00?
A. Yes, sir, there is an error there by the bookkeeper in passing the balance, the balance shows $4.00.
Q. Please examine the bill I show you of October 31st and see if the bookkeeper didn't repeat his error—if there was a balance of four dollars why was that bill made out for two dollars?
A. It does show a balance of four dollars.
Q. That bill wasn't made out showing a balance of four dollars, was it?
A. If the balance shows only two dollars it should have been four.
Q. Please examine the bill for December 31st and state to
72 the jury why you showed no balance due on that but presented a bill only for the current month?
A. A balance should show there of four dollars?
Q. That bill only shows for the current month?
A. Yes, sir.
Q. There wasn't any apportionment of that on account, was there?
A. No, sir.
Q. That is payment for the month of December $2.00?
A. Yes, sir.
Q. The month of December is paid?
A. Two dollars paid.
Q. Your receipt is for the service of the telephone for the month of December, 1907?
A. That is what the receipt shows.

Q. Now I want to ask you—you say you went in in September, 1907?

A. Yes, sir.

Q. I want to ask you if it isn't a fact that about that time there was a great deal of confusion in the matter of the collection of your accounts and keeping of your books?

A. There was an auditor there at that time getting ready to transfer from the ledgers.

Q. Isn't it a fact there was a great many accounts, that turned out afterwards to have been paid, that were not marked paid on your books?

A. Yes, sir.

Q. Isn't it a fact that there was a number of customers in
73 this town that had to come to the office with their receipts to keep you from shutting off their telephones?

A. If there was an error and they brought in their receipts we adjusted it right away.

Q. Weren't there a great many errors at that time?

A. There was some.

Q. It was almost a constant thing?

A. No, I wouldn't say a constant thing.

Q. Didn't you cut out Henry Armistead's phone after he had paid——

Mr. TERRY: Object to that.

The COURT: The objection is overruled.

To which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record.

A. I don't remember whether they shut it off or not.

Q. Did you know anything about it at the time?

A. I don't remember it.

Q. Is it a fact?

A. I don't know; I couldn't say without looking it up.

Q. Did you not send a notice to Mr. Dillard, when he had his receipts that you were going to shut his telephone off?

Mr. TERRY: Object to that.

The COURT: That only goes to the correctness or incorrectness of the books; that is not to be considered against this company for any purpose except to show the correctness or incorrectness of its books. The objection is overruled.

To which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record.

74 A. He asked me if I sent a notice to Mr. Dillard, I couldn't tell from memory.

Q. You did send out a good man- of those notices about that time?

A. We sent out quite a few notices.

Q. You had to take back-water on a good many of them?

A. I wouldn't say that.

Q. You know in a great many instances you did, didn't you?

A. No sir, I did not.

Q. Did you ever?
A. We have, yes sir.
Q. Didn't you notify Mr. Palmer Danaher and threaten to take his phone out and he had to bring up his receipts?

Mr. TERRY: That is objected to.
The COURT: That is only to shed light upon the correctness or incorrectness of the company's books.
To which action of the court the defendant at the time excepted and asked that its exceptions be duly noted of record.

Q. Didn't you have the same trouble with Malloy & Danaher?
A. You asked me for specific instances.
Q. I am asking you now if these things did occur after you went there?
A. Yes, sir, I stated that.
Q. I will ask you if it isn't a fact that there was great confusion in the books of the telephone company with regard to the payments by its customers during this year of 1907?
A. What do you mean by confusion?
Q. Charging people that didn't owe, and failing to credit payments that were made, and balances shown on your books
75 that were not correct?
A. There might have been.
Q. Don't you know there were?
A. Yes, there were instances.
Q. Isn't it a further fact that the collectors had not been turning in what they collected?
A. Yes sir.
Q. How many of them had been in default?
A. Two of them I think.
Q. Do you know how many instances that they failed to turn in what they collected?
A. I couldn't say.
Q. Do you know what their defalcations amounted to?
A. I don't remember now.
Q. Give us an idea?
A. I don't know.
Q. You are a bookkeeper?
A. The cashier had charge of that matter.
Q. Did you have anything to do with the matter?
A. Nothing to do with the defalcations at all.
Q. Did you have something to do with keeping the books?
A. That was my duty, entering it after it was turned in.
Q. Didn't it bring you into position to know the extent of these defalcations to some extent in correcting your books?
A. I don't remember what it was.
Q. Can't even remember whether it was one hundred dollars, fifty dollars or two thousand dollars?

Mr. TERRY: Object to that.
The COURT: The jury understands again that this is not to be

taken against the company in this case except so far as it
76 may reflect upon the correctness or incorrectness of their books. All exceptions are saved along that line.

Q. Who is that signed by, do you know (indicating notice)?
A. Signed by L. N. Loring, Manager, and Miss Margaret Plunkett.
Q. She is a lady who works in the office?
—. —.
Q. Has she authority to sign these things?
A. Yes sir, she has.

Redirect examination.

By Mr. TERRY:

Q. Do you know what the custom was about sending out notices to delinquents, he has shown you this notice sent out in April, 1908, to Mrs. Danaher?
A. You mean this last notice?
Q. Sent to her after her phone was disconnected?
A. The bookkeeper made up a list of the people who were in arrears, that hadn't paid their rent; that was passed to the cashier—the books at that time, I believe, showed that the amount was $6.75, that is what the notice shows—the cashier got that account and sent out the notice.
Q. Why did he send out that notice?
A. Four dollars balance and $2.75 for the current month of April.
Q. What was the custom in April 1908 with respect to past due bills, whether they sent out notices to parties whose accounts showed two months past due.
A. We sent them to all people who owed two months and over.
77 Q. In April 1908 you sent notices to everybody?
A. Yes sir.
Q. Like that?
A. Yes sir.
Q. When the books showed she owed $6.75, more than two months rentals, you sent that notice?
A. Yes sir.
Q. Know anything about the notice sent on the 13th of March on the instance of the payment of this bill——

Mr. WILLIAMS: Objected to as irrelevant, incompetent and immaterial.
The COURT: The objection is overruled.
To which action of the court plaintiff at the time excepted and asks that her exceptions be duly noted of record.

A. On the 13th of March after I gave that receipt "by cash $2.00" and made the memorandum to pass to Mr. Jeffreys, Mrs. Danaher made the remark that she had receipts for four dollars and Mr. Jeffries sent her the notice.
Q. What kind of notice did you send, always five or ten days?

A. Ten days.
Q. Is that the form?
A. Yes sir, that is the form.
Q. Was that notice sent on the 13th of March?
A. Who signed the notice?
Q. The notice, after you had made your memorandum and passed it to Jeffrey, was that notice mailed to her?
A. I couldn't say as to that; after I passed it that is all I know about it.
78 Q. She said she had the receipts?
A. Yes sir.
Q. Did you ask her to produce the receipts?
A. I told her we would send out and get them.
Q. Did you ever send any one out to get the receipts?
A. I wouldn't have charge of sending anyone out. Mr. Hughes went out as I remember.
Q. Did the man who went to take out the phone go also to ask for the receipts before taking it out, or do you know about that?
A. I couldn't say as to that.
Q. When these several bills are made out, these bills in September, October, November and December, showing a balance of two dollars, a balance of two dollars, no balance, etc., they are not in your handwriting I believe?
A. October 1907 is in my handwriting. There is a stub about so wide (indicating two inches and a half thereabouts) that is attached right to this bill, that is for the collectors. When the bill is paid he tears it off and the stub is his memorandum that he brings in at night. The bill was made out "Name, Mrs. Danaher, account No. 1267, No. 11 is the route number, month ending October 31st, two dollars."
Q. Does that correspond with the books?
A. Yes sir, October $2.00. They commence making these bills up about the 23rd or 24th and the bills are made up by the first of the next month.
Q. For the next month?
A. Yes sir, that was made out the latter part of September for October and on the 1st day of October the bills are given to the bookkeeper to pass balance on them. In writing this in this balance $4.00 was overlooked and it was made two dollars
79 balance.
Q. Who put that two dollars balance on there, whose handwriting is that?
A. I don't know; the lower figure is mine, the top figure is not mine.
Q. In this December bill in your handwriting?
A. It is not.
Q. There is nothing on the December bill except the current charge of two dollars?
A. Yes sir.
A. Turn to those months September, October, November and December 1907 and see if this book shows that there was always carried a balance of four dollars?

A. In September there is a balance of four dollars brought forward and the two dollars current charge, making $6.00. October 1st $4.00; November $4.00; December $4.00; January $4.00; February $4.00.

Q. Look and see if there has been any erasures or changes from January 1907 on as far as this book goes, as to that four dollars?

A. No erasure.

Q. In July it figures $6.00 because they failed to pay in June?

A. Yes sir.

Q. Turn over here and see if there is any erasure or changes from $4.00 to $2.00, or $2.00 to $4.00?

A. No changes.

Q. Whatever these receipts show your books always show a balance of four dollars?

A. Yes sir. It shows it first started in January and February 1907.

Q. Have you receipts for January & February 1907?

80 A. No, we haven't got them.

Recross-examination.

By Mr. WILLIAMS:

Q. If these are not your receipts or your figures whose are they?

A. Which receipts?

Q. The ones you have been talking about?

A. Whoever passed the bills on there.

Q. It was somebody in your office?

A. Yes sir it was somebody.

Q. Somebody employed there just as you were employed?

A. Yes sir.

Q. They didn't call in some street bum to make out their bills did they?

A. No sir.

Q. Didn't turn it over to the janitor?

A. No sir.

Q. Somebody connected with the office and connected with the books made out the bills?

A. The party who wrote the bills at that time was connected with the books.

Q. Somebody in the telephone company's office made those bills out?

A. Yes sir.

Q. How long did you continue to be bookkeeper there?

A. From September to about I think it was April, then I worked at the window as window teller; then they cut down and I was back as head bookkeeper until September this year when I was made window teller again.

81 Q. You say there was a notice sent out in March to Mrs. Danaher, or about then?

A. I believe it was in March.

Q. You know that was done?

A. I know I gave Mr. Jeffreys the slip or memorandum to send a notice and investigate the account, as shown by my receipt of the 13th.

Q. Do you know what he did with it?

A. He should have sent the notice.

Q. If he sent that notice why did you send another on the 16th of April?

A. Well we didn't have the telephone out then; we continued to charge for the telephone unless it is taken out. I believe they refused to give up the phone—of course we didn't know anything about that. In April they owed $2.75 for April and this four dollar balance, which made, with the balance, $6.75 due for April.

Q. If you shut off her service in March how did she owe you anything in April?

A. We continued charging on the books just the same.

Q. Just charged anyhow whether she used it or not?

A. A card is made up and given to the lineman to take out the phone. When he gets the phone O. K.'s that card and it comes back to the manager's office and is sent to the bookkeeper reported out on whatever day he took it out.

Q. Suppose you shut it off in the office in March you kept on charging when you were not giving any service?

A. We charge on the books until we get that card.

Q. Don't make any difference whether you ever get the
82 card?

A. We can't do anything else.

Q. Is that the telephone company's method of doing business—shut a man's service off and keep on charging him?

A. Suppose the phone is ordered out on the 1st day of this month, the card will show when he took that phone out. The card is sent to the city foreman from the manager's office and we know nothing about them ordering the phone out aside from the fact that we simply O. K. that for whatever rate it would be, if it was a residence the rate would be $2.75. We don't report that phone out until after the card comes back to the bookkeeper after the lineman actually takes the phone out.

Q. Somebody in your office cuts off the use of the phone at the office and so far as the user of the phone is concerned he is as effectually deprived of the phone as if it was taken out of his house?

A. Yes sir.

Q. But still you go on and charge him on the books?

A. On our books we still continue to charge him. When it comes in we make up an allowance and allow him for the time his phone was out of service.

Q. On the 16th of April you were sending her a bill of $6.75 and were charging her for April service when as a matter of fact in March you had discontinued her service?

A. That is the way our books showed at the time; the phone wasn't taken out.

Q. Do you know whether it is a fact your books now show her a credit of two months in advance there?

A. I am not bookkeeper at present and couldn't say we show two months in advance.

83 Q. What do they show?

A. I wouldn't want to say inaccurately.

Redirect examination.

By Mr. TERRY:

Q. Any card ever come back to your office or anyone advise the bookkeeper that this phone had been taken out by the lineman?

A. No sir.

Q. Therefore you continued to charge her on the books with the regular rate for the telephone?

A. Yes sir, we charged her the regular rate.

By Mr. WILLIAMS: Whose business was it to notify you or send that card in there?

A. It came from the Manager's office.

Mr. TERRY:

Q. That card wouldn't come in unless the lineman had actually gotten the telephone?

A. No sir.

Cross-examination.

By Mr. WILLIAMS:

Q. You would discontinue at the officce and keep on charging?

A. We would until we got the card.

Q. If you discontinued service in the office and didn't take the phone out of the house you never would quit charging on the books?

A. Yes sir. They insisted on not giving the phone up.

Q. You kept charging on the books without giving them service?

A. Yes sir, when she came in we would allow her for whatever time they were out.

84 Q. If she didn't, as in this case pay what you claimed was due you wouldn't credit her or give her service either?

A. If she didn't pay what she owed or what the books showed she owed.

Q. No matter whether that was the current month or what it was?

A. It was four dollars balance.

Q. She had to pay that all up or you wouldn't give her any service?

A. Yes sir.

Witness Excused.

85 *Testimony of G. C. Hammond.*

Mr. G. C. HAMMOND, the next witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TERRY:

Q. Were you in the employ of The Southwestern Telegraph & Telephone Company in 1907 as bookkeeper?
A. Yes sir.
Q. Examine the ledger there and see if you were bookkeeper during the time this ledger was made up. When did you begin as bookkeeper?
A. In August, this month right here (indicating in book).
Q. Is that the book you worked on?
A. It is.
Q. Is that the condition you found it in?
A. Yes sir.
Q. Now examine these bills and see what they show, Mrs. Danaher's account?
A. It shows there was no payment made in January or February, four dollars, and this balance was carried forward until June. There was no payment made in June, according to the books, and a balance of $6.00 was carried up to July when a payment of four dollars was made.
Q. What day?
A. On the 15th day of July payment of four dollars presumably for those two months.
Q. Those balances found on the books when you commenced work, has there been any erasures or changes of those balances?
A. They appear to be just like they were when first made.
86 Q. Is that your recollection or do you remember?
A. I don't remember.
Q. How long did you keep that book?
A. From August 1907, until about the 1st of February 1908.
Q. Was Mr. Vedder assisting you in any way during that time?
A. Yes sir.
Q. When did he come in?
A. I believe in September.
Q. Mrs. Danaher or anyone else for her ever pay you anything?
A. Not that I remember of.

Cross-examination.

By Mr. WILLIAMS:

Q. You don't remember having any transactions with Mrs. Danaher at all?
A. No sir.
Q. Did you have anything to do with making these bills out?
A. Yes sir.
Q. Did you make out this bill of December 31st, 1907?

A. That is my writing, yes sir.
Q. Figures and all?
A. The name is I know, yes sir and the figures look like mine; that is my writing, I made that bill out.
Q. This December 1907 bill?
A. Yes sir.
Q. Did you make out the bill of September 30th, 1907?
A. I never made that one.
Q. Who made it, do you know whose writing that is?
A. I think that is Mr. Hughes.
87 Q. Which Mr. Hughes?
A. G. W. Hughes.
Q. Did you make out the one of October 31st?
A. I did not.
Q. Some of those bills show one balance and some another, and this December bill shows no balance at all, can you explain that?
A. Well the amount of the advance charge was always made out first and we checked back the old balance and put it on. Of course sometimes, among several thousand bills, one may be overlooked.
Q. How would that happen if your books showed a balance of four dollars running all along through there, you said you would make out a bill previously rendered for $2.00, your books didn't show that did they?
A. That was September wasn't it?
Q. It shows four dollars?
A. Four dollars at the first of the month.
Q. How did you come to make that error?
A. That would be a clerical error.
Q. If he took any balance at all from his books he would take four dollars wouldn't he?
A. He should have.
Q. He evidently didn't take that from the books at all?
A. Unless this bill was made out on the 26th——
Q. It could not have been made out on the 26th when it was paid on the 21st?
A. She paid $2.00 on the 21st, and left a four dollar balance. This four dollars was for August and September if the bill was made out by the 21st of this month.
Q. She paid it on the 21st. When was August paid?
A. 19th.
88 Q. Then this bill could not have been made out for August?
A. What I mean is. This payment was on the 21st, now if this payment had been made at a prior date, this two dollars would have been payment for July and the $4.00 for August and September——
Q. As a matter of fact it was not?
A. No sir.
Q. This bill then could not have been taken from your books?
A. I couldn't say as I didn't make out the bills.
Q. Your book shows a balance of $4.00 on October 31st, and your bill shows $2.00?
A. What is the date of payment?

Q. October 4th.
A. It should have been, according to the books, $4.00.
Q. This is the same as that then?
A. The books show $4.00 balance along there.
Q. Then this balance taken here of $2.00 could not have been taken from your books?
A. It should have been $4.00.
Q. If it had been taken from the books it would have been four dollars?
A. If it was taken correctly it would have been.
Q. The books didn't serve much purpose then—Can you tell who made this special receipt out, May 1908?
A. I cannot.
Q. How long had that form of receipt been in use?
A. I don't think it was in use at any time that I was there.
Q. When did — begin to use them?
A. I couldn't say it must have been after I left there.
89 Q. What is the reason of it, why is it made out in this manner and not on the other form?
A. I couldn't tell the reason that the company changed.
Q. They are still using forms practically like this—this is marked "special receipt" isn't it?
A. Yes sir, it is printed there.
Q. What is that special receipt used for?
A. I don't think that kind of a receipt was used while I was in the service.
Q. Then you don't know anything about why it was used?
A. I don't know anything about it.

Redirect examination.

By Mr. TERRY:

Q. I will ask you to look at this book and see if it shows Mrs. Danaher's account first in red ink, four dollars, and the account just above in red ink shows $2.00, couldn't the bookkeeper or the party who made the bill misread it and put the two where it should have been four?
A. I have made that error often myself.
Q. I will ask you if the same thing doesn't occur here (indicating in book)?
A. If I could look at the receipts I could tell whether that occurred at the same time.
Q. I will ask you if the books don't show a red 4 and a red 2 under it?
A. The books show a balance of $2.00 in the December account above it while Mrs. Danaher's account shows a balance of $4.00.
By Mr. WILLIAMS: What does it show that account to be in September?
90 A. For September it shows a balance of $4.00.
Q. Then that excuse wouldn't hold good for the other

months; you began there in December, the 2 is immediately over the 4?

A. Yes sir.

Examination by Mr. TERRY:

Q. What month is that month?
A. December 1907.
Q. What is that?
A. January 1908.
Q. Back here, what month is that?
A. That is August 1907.
Q. In September it is four and four?
A. Yes sir.
Q. But the line above and a little to the left shows a red 2?
A. Yes sir.
Q. Was it possible to have mistaken that in making the bills out?
A. Yes sir, that mistake occurs at intervals.
Q. Isn't it possible for him to have called a four and the other man to have written two?
A. Yes sir, that is possible.
Q. In other words you are as liable to make mistakes as anybody else?
A. Yes sir.

Cross-examination.

By Mr. WILLIAMS:

—. By your theory, in December, if that accounted for the mistake, you would have rendered a bill for two dollars balance whereas you didn't render it for any?

91 A. If they made that mistake there it is true it would have been two dollars.

Q. But when you rendered that bill you didn't have any balance at all?
A. No sir.
Q. And in September and October that two dollars wasn't over there?
A. No sir.
Q. So the way you account for that mistake is not a remedy if that error wasn't there?
A. I am not making any excuses about anything. I am telling you the way we sometimes made an error.
Q. You sometimes made an error in not crediting people's accounts that had paid didn't you?
A. Sometimes, yes sir.
Q. During the year 1907 that occurred with a good deal of frequency in the telephone business?
A. Where there are so many accounts it is more apt to occur than where there are but few accounts.
Q. Did it occur a good deal in your accounts?

A. Yes sir, sometimes.
Q. Isn't it a fact your books were in more or less confusion in 1907?
A. In what way?
Q. You weren't crediting people who paid you?
A. We credited all collections that came in unless it was just a clerical error.
Q. Some of them didn't come in then?
A. I couldn't say about that.
92 Q. Isn't it a fact there was quite a number of people that didn't have credits on your books who afterwards showed they had paid their bills?
A. Yes sir, there were a few.
Q. Wasn't there a few whose phones you had threatened to take out?
A. I had nothing to do with that part of it.
Q. Isn't it a fact some of your collectors were in default during that time and were not turning in collections they were making?
A. I understand so.
Q. As a matter of course the parties couldn't get credit?
A. No sir.
Q. Isn't it entirely within the bounds of possibility if not probability that these mistakes in this case might have occurred just that way?
A. It is possible that they could.

Redirect examination.

By Mr. TERRY:

Q. Where are you working?
A. St. Louis National Life Insurance Company.
Q. When did you leave the service of the telephone company?
A. It was the latter part of January 1908, to be exact I think it was the 18th.
Q. How long did you work for them all told?
A. From about the 1st of August until that time, about seven months.
Q. Ever worked for them before or since.
A. No sir, never before or since.
93 Q. Keeping books now?
A. Yes sir.
Q. How long have you been a bookkeeper?
A. Regularly about two years, but at intervals for about eight or ten years.
Q. They have asked you about these mistakes occurring in bookkeeping, do you know of any mistakes occurring in other places of business?

Plaintiff objected to above question, as irrelevant, incompetent and immaterial. The court overruled said objections, to which action of the court plaintiff at the time saved her exceptions.

A. In every other business I have ever worked in I have made mistakes and others have.

Q. Did you make any more mistakes there than you have made since you left, or before

A. I don't know that I did. I never made an unusually large mistake on those books.

Plaintiff objected to above answers and questions as irrelevant, incompetent and immaterial. The court overruled said objections and plaintiff at the time saved her exceptions to such rulings of the court.

Q. You have no interest in this case or this matter at all?

A. Not in the least, none whatever.

Recross-examination.

By Mr. WILLIAMS:

Q. You state in the multitude of accounts you had to keep for a number of subscribers that there was more chance of errors in this business than in any others?

94 A. I meant in proportion to the amount of work on the accounts.

Q. The chance of errors in this matter are much greater than it is in an ordinary business?

A. In bringing these balances forward the chances are greater than where you had only one account to a page.

Q. The very character of the business makes it more subject to errors, the way of keeping your account?

A. Well, I hadn't thought about that seriously, I don't know whether in proportion it would be or not, I don't know whether the proportion, whether the percent of mistakes, in proportion to the number of accounts, would be any greater than it is in any other business.

Q. There is a great many people that have to do there with the books, or the matters that go on the books?

A. On those books there was only two of us that had anything to do with the entries on the books.

Q. You had a considerable number of collectors?

A. They had nothing to do with the books.

Q. They had a great deal to do with reporting what you would put on the books?

A. Yes sir, the collections.

Q. Who did they report to?

A. The cashier.

Q. Did he refer them to you?

A. Their list was turned over to us.

Q. Then the collector and the cashier handled those accounts before they ever got to you?

A. I don't remember exactly how they did come, but I know the money was turned over to the cashier, he checked it with

95 their list, the account was balanced and then they were turned over to us after they were balanced.

Q. An error in any one of those before it reached you would necessarily run through your books too?
A. If they failed to report a collection the account certainly would not get credit on our books until the next month when the receipt would be brought in.
Q. The chance of the collector making a mistake in turning in the money, the chance of the cashier failing to enter it after it was turned in to him, either one of those two, would cause an error in your entry, a failure to enter the proper credit wouldn't it?
A. Yes sir.

Redirect examination.

By Mr. TERRY:

Q. You say this error would occur until the next month when the receipt would be shown?
A. If any subscriber failed to get credit the next month a bill would be mailed out for four dollars, then the subscriber would produce his receipt and we would trace it back and correct his account.
Q. Suppose he lost his receipt?
A. If he lost his receipt we would have no record of it ever having been paid.
Q. Suppose a delinquent refused to produce his receipt, it would be the same way wouldn't it?
A. Yes sir.

96 Recross-examination.

By Mr. WILLIAMS:

Q. If he didn't have the receipt he would have to stand charged and take the penalties the phone company put on him?
A. No sir, not exactly that.

Mr. TERRY: I object to that kind of talk.

Witness Excused.

97 *Testimony of Claude Jeffries.*

Mr. CLAUDE JEFFRIES, the next witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TERRY:

Q. What position do you hold with the telephone company?
A. Teller, at present.
Q. Did you hold any position here in March 1907?
A. I was collector in March 1907.
Q. Do you know Mrs. Danaher?

A. I have collected of her once or twice.
Q. Where did you collect?
A. I collected one time at the residence.
Q. What month was that?
A. That was in March 1907, the 30th.
Q. How much did you collect from her that day?
A. Two dollars.
Q. Did you have a bill showing a balance after crediting her with two dollars?
A. I had a bill for six dollars at the time.
Q. You receipted her for March?
A. I receipted her on account by cash across the face of the bill.
Q. That bill showed a balance of four dollars on March 1907?
A. March 1907, yes sir.
Q. Did you ask her for receipts?
A. She said at the time she didn't owe the balance and would look her receipts up and bring them down, she didn't have them where she could get them just at present. It was in the afternoon, I suppose about two or three o'clock, when I was there.

98 Q. Did she ever bring those receipts down?
A. Not to my knowledge.

Q. Ever have anything further to do with the account?
A. No sir, until March 1908 again.
Q. What did you have to do with it in March 1908?
A. At the time she made a payment on March 13th, 1908, the account still showed a balance of four dollars.
Q. The same balance a year ago?
A. Yes sir. We made up a ten day notice, which expired March 23rd, which said that unless the bill was paid on or before that day we would have to discontinue service.
Q. Was that notice mailed to her at her address?
A. Yes sir, 2022 Izard.
Q. What was your custom in following up those notices by calling the parties on the day it expired?
A. At that time and up to now we still call them. At that time we made an impression copy of the notice and also kept a copy in a book and the day the notice expired.
Q. Have you got a copy of that here?
A. There is a copy of the notice in the copy book, yes sir.
Q. What was your custom about calling up the party on that day and reminding them over the phone?
A. We always called them up and told them again that we had sent them a notice and that unless the amount was paid we would have to discontinue service.
Q. Was she called on the 23rd of March?
A. Yes sir.
Q. Do you know who answered the phone?
A. No sir.

99 Q. Do you remember what reply was made?
A. No sir.

Q. Turn to this letter book and show that copy of the notice you sent her?

A. Copy of notice on the 2nd page, March 13, 1908.

Q. Who is that to?

A. Mrs M. J. Danaher. "Your bill for rental of telephone service March 31, 1908, amounting to $4.00 is still unpaid. We trust you will settle this at our office on or before March 23, 1908, otherwise we shall be compelled to cancel our contract with you and discontinue service. Yours truly, L. M. Loring, M'g'r."

Q. That is dated what?

A. March 13th.

Q. Do you know when the telephone was actually disconnected?

A. It was disconnected about March 30th; at the expiration of that notice we didn't disconnect it right away. She claimed she had receipts for the balance and we were trying to get the receipts.

Q. Do you know whether anyone was sent out there for the purpose of getting or seeing those receipts?

A. I don't know of anyone being sent out.

Q. Or anyone going out?

A. I think Mr. Doyle went out but I am not positive.

Q. Ever make any collections except the collection in March 1907?

A. One collection is all I have made up to this time.

Q. She told you she would get the receipts but didn't have time right then to do so?

100 A. Yes sir.

Q. And she would bring them down to the office to show them to you?

A. Yes sir.

Q. When she paid you in March 1907 did she tell you what month to apply that payment on?

A. No sir, just simply said she didn't owe the balance. I asked her for the receipts and she said she would look them up.

Q. That was at her house?

A. Yes sir.

Q. About two o'clock in the afternoon?

A. Yes sir, between two and three o'clock; some time after lunch.

Q. Did you know Mrs. Danaher?

A. No sir.

Q. Would you know her now, is that the lady you saw there (indicating plaintiff)?

A. Yes sir.

Q. Does that look like the lady you had the conversation with?

A. Yes sir, then I saw her once besides in the office in March.

Q. Was she there in March 1908?

A. Yes sir.

Q. What day?

A. March 13th, 1908, the day this notice was mailed.

Q. She paid two dollars then?

A. Yes sir.

Q. Was anything more said about those receipts?

A. I didn't hear the conversation. I didn't wait on her in March in the office, Mr. Vedder waited on her.

101 Cross-examination.

By Mr. WILLIAMS:

Q. Can you state how you happened to know it was in March 1907 that you went out there and saw her?

A. My collection book for that day will show that I collected two dollars from Mrs. Danaher.

Q. Have you got that with you?

A. Yes sir.

Q. When did you examine that?

A. You mean when did I examine it last?

Q. Turn to that—where does it say anything about 1907?

A. Here is a page that shows 3/30/07.

Q. Are these matters all in your handwriting in this book?

A. Beginning with March it is in my handwriting; up to March it wasn't.

Q. After March they continue in your handwriting?

A. Yes sir.

Q. How long did they continue after that?

A. I think they continued until the end of the book in my handwriting; no one else used my book.

Q. Now at the time you were there Mrs. Danaher told you that she didn't owe the balance of January and February?

A. She told me she didn't owe the balance, that she would look up her receipts and bring them down to the office.

Q. What was that balance?

A. Four dollars, it covered January and February 1907.

Q. Told you she didn't owe that?

A. Yes sir.

102 Q. She paid you two dollars?

A. Yes sir, and I gave her a receipt by cash.

Q. That bill that you presented was for January and February and March?

A. Yes sir.

Q. She told you she didn't owe for January and February?

A. Yes sir.

Q. That she had already paid them?

A. Yes sir.

Q. Then paid you two dollars?

A. Yes sir.

Q. What was that for?

A. On account.

Q. Why was it on account when she said she didn't owe the other two?

A. She didn't specify that it should be for March.

Q. Could she have specified it any better than by telling you she didn't owe January and February?

A. I don't know that she could, no sir.

Q. When you presented the bill for January and February and March and she told you she didn't owe for January and February, and paid you $2.00, don't you know she meant it for March?

Mr. TERRY: Objected to.

A. She was only paying two dollars on account at the time, as I understood it.

Q. Why did you understand that when she told you that the rest of it she didn't owe, she had already paid?

103 A. I had several people make the same statement, but on making up the bills I found that they did owe it.

Q. When they told you they didn't owe you over two dollars and paid you two dollars you would have no room to infer they were paying an old account?

A. No sir.

Q. Wouldn't you know that they were paying for what they assumed to be due at that time?

A. I wouldn't know they were paying for March, no sir.

Q. Would you have any reason to think anything else?

A. Yes sir.

Q. Why?

A. Because while she said she didn't owe the other bills she wasn't positive.

Q. Didn't she tell you she didn't owe it?

A. She couldn't show me where she didn't owe it.

Q. She was claiming then and there that she didn't owe it?

A. Yes sir.

Q. She admitted she owed March?

A. Yes sir.

Q. Paid you two dollars?

A. Yes sir.

Q. Yet you say she was paying on account?

A. I receipted her on account.

Q. Then that was your work?

A. Yes sir.

Q. She didn't tell you to receipt her on account?

A. She didn't positively come out and say she wouldn't pay the balance, only she said she didn't owe it.

104 Q. She said she didn't owe it and had receipts for it?

A. Yes sir.

Q. Could you imagine her declining to pay it in a more positive manner than that?

Objected to.

Q. You understood very clearly that she was disputing the bills of January and February?

A. Yes sir.

Q. And that she had paid two dollars which was on March?

A. Yes sir.

Q. You never had anything more to do with the account?

A. No sir, nothing more to do with the collection of the account up until this notice was sent.

Q. If you saw that notice sent out was it one similar to this notice here?

A. One made up on the same order only the dates were different.

Q. Why did you send that one out after having sent the other one?

A. A different amount.

Q. What is the difference?

A. This amount was $6.75.

Q. What made that?

A. That is with the month of April added to it.

Q. After you had sent the other out why did you send that one afterwards?

A. Well, the account hadn't been paid. Of course I didn't make this notice up myself.

Q. Did you make the other one up?

A. Yes sir.

105 Q. Were there two or three different people making out these notices?

A. We usually have two or three clerks making them up.

Q. Who directs that they be made up?

A. The cashier.

Q. Did the cashier direct you to make this one up?

A. Yes sir.

Q. Did he direct someone to make that one up?

A. The system is this, we take every account that shows more than two months past due, we take the duplicate bill and if it is still in the file we make a notice for it. We have these notices checked with the ledger and if the ledger shows that this account is unpaid we mail the notice.

Q. To everybody?

A. To everybody that is more than two months past due, two months or more.

Q. You shut off her telephone on March 30th you say?

A. Yes sir, about that date.

Q. Then at the time you sent that notice you had already shut off her phone?

A. Yes, sir.

Q. Not giving her any service at all?

A. No sir.

Q. Hadn't been since the 1st of April?

A. Yes sir, about that date.

Q. That notice was for what purpose, what further purpose did you have in sending that notice if you had already shut her phone off?

A. There would have been no purpose in sending this notice if the telephone was already shut off.

106 Q. You shut the telephone off and kept on charging her, sent another notice and charged her up with a month for which you gave her no service, is that a fact?

A. Yes sir.
Q. And the object and purpose of that notice by the telephone company was that she should have no service until she recognized your demand for that balance of four dollars?
A. Yes sir.
Q. That dated back in January and February 1907?
A. Yes sir.
Q. Isn't it a fact your books show that she had continuously paid for the months, that is she made equal payments for the months after February 1907 up to and including the time you shut her off?
A. Yes sir.
Q. So that your shutting her off and your threat to take her phone from her was to make her pay a disputed bill of more than a year ago?
A. Pay it or show where she had already paid it.
Q. Accede to your demands?
A. Yes sir.

Redirect examination.

By Mr. TERRY:

Q. Her purpose in declining to give you either the receipts or surrender her telephone was to force you to accede to her demands and accept her word against your books?
A. Yes sir.
Q. You had asked her to show the receipts and she wouldn't have to pay it?
107 A. She said she would look them up and bring them down to the office.
Q. Her purpose was to make you take her word and give her that four dollars, or stand a law suit for $4,000?
A. Yes sir.
Q. What is your present position?
A. Window teller.
Q. You are the teller at the window?
A. Yes sir.
Q. What were you at this time?
A. In March 1907?
Q. Yes?
A. I was collector.
Q. In March 1908?
A. I was chief collector.
Q. At the office?
A. Yes sir.

Recross-examination.

By Mr WILLIAMS:

Q. Know anything about how Mrs. Danaher's account has been credited since then?
A. Since that time?

Q. At this time, you are not running that balance along now are you?

A. No sir.

Q. Ever get any money on that old balance?

A. When she came in and made two payments, made the April payment and the May payment, that more than brought the
108 balance up by giving her credit for the time her telephone was disconnected and not charging her for the time she was out of service, that brought the balance up.

Q. How is it she stands two months ahead?

A. She stands $4.45 ahead. Allowance was made for four dollars on the recommendation of Mr. Hughes.

Q. For what four dollars?

A. The four dollars they shut it off for.

Q. The four dollars in dispute?

A. Yes sir.

Q. You charged that off?

A. Yes, we sent Mr. Hughes out to see her.

Q. You credited her with the time you had deprived her of the use of the phone?

A. Yes sir.

Q. She did pay you right along notwithstanding her phone was shut off?

A. Yes sir, we credited her with forty days out of service.

Q. By crediting her, or in other words, giving up the dispute about the four dollars and then crediting her for the time she had been cut off, and for which she had still continued to pay, it put her forward four dollars?

A. It put her forward $4.45.

Witness Excused.

109 *Testimony of Geo. W. Hughes.*

Mr. G. W. HUGHES, the next witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TERRY:

Q. Were you in the employ of The Southwestern Telegraph & Telephone Company in 1908?

A. Yes, sir.

Q. In what capacity?

A. Contractor and soliciting agent.

Q. Did you go out and see Mrs. Danaher about this disputed bill with the telephone company?

A. Yes, sir.

Q. What was your purpose in going out there?

A. To adjust the matter of the delinquency, which occurred in January and February 1907.

Q. Did you ask for any receipts covering the time?

A. I simply told her I was out there for the purpose of adjusting this matter and asked her to sign a voucher which is used as authority for rebates or allowances. She said she wouldn't sign the voucher but would refer it to her son. I came back to the office and wrote Mr. Loring a letter setting out my transaction with Mrs. Danaher. That was on or about May 8th. I recommended that the allowance be made and I understand it was made immediately notwithstanding the fact that Mrs. Danaher didn't sign this voucher.

Q. And notwithstanding the fact she hadn't produced the receipts?

A. Yes, sir.

110 Q. Did you talk to her about the receipts?

A. Yes, sir.

Q. What did she say?

A. She told me she had had those receipts but she couldn't place them, or had lost them or something to that effect, that she couldn't get her hands on them but she was satisfied that they were paid.

Q. That was in May 1908?

A. Yes sir.

Cross-examination.

By Mr. DANAHER:

Q. At that time did she satisfy you that she had paid——

Mr. TERRY: That is objected to.

Q. State what was said? You didn't ask her to produce those receipts at that time?

A. I asked her if she had them, that I would like to see them.

Q. She told you she had lost them?

A. Had lost them or misplaced them, or something to that effect.

Q. The telephone wasn't turned on until after you came back to the office from that visit?

A. No sir, I don't think it was.

Q. Do you remember what time of the day it was you were out there?

A. It strikes me I was out there probably in the morning, I don't remember really.

Q. Do you know whether you came back to the office before dinner or not?

111 A. No sir, I don't recall, but still if it was in the morning I did get back before my dinner hour.

Q. What was in that voucher that you asked her to sign?

A. Nothing more or less than just a written allowance covering this delinquency of four dollars. It acted the same as a receipt to show that she had received that allowance.

Q. Was there written in that voucher also, a release from all damages for having shut the phone off?

A. No sir, nothing like that. Those things hadn't come into consideration at all, it was just a matter of adjusting this little difference.

Q. You didn't leave the voucher with her to show her son?
A. I don't think I did.
Q. Didn't you tell her you would take it back to the office make it out in more correct form and mail it to her?
A. I don't recall it if I did.
Q. You never did mail it to her to be signed did you?
A. I didn't, no sir.

Redirect examination:

Q. The purpose of the voucher was simply to be a ticket for the bookkeeper to keep his books straight?
A. Yes sir it was authority from headquarters in such cases, but we had to have a receipt showing that the allowance had been made.
Q Are you working for the telephone company now?
A. No sir, I haven't been since the 1st of September 1908.
Q. Where are you working now?
112 A. The National Consolidated Casualty Co.
Q. You said nothing had been said or thought about damages at this time when you were trying to get her to sign that voucher?
A. Not to my knowledge.
Q. Did she mention any?
A. No, sir.

Witness Excused.

113 *Testimony of Ernest Sowell.*

Mr. Ernest Sowell, the next witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Terry:

Q. Are you working for the Southwestern Telegraph & Telephone Company?
A. Yes, sir.
Q. In what capacity?
A. Bookkeeper.
Q. How long have you been bookkeeper?
A. Since April of last year, about the middle of April.
Q. Do you know anything about this disputed account with Mrs. Danaher?
A. I wasn't there at the time that the first dispute came up. I have learned since that there has been a dispute about it.
Q. Did you hold any other employment or occupation with the company before you were a bookkeeper?
A. Yes sir, in 1907 I was employed as a collector for about six months.

Q. Ever make any visit to Mrs. Danaher's house in 1907 to collect any bills?

A. Yes sir, I think I called on her. I couldn't tell you the correct number of times but I went more than once.

Q. Do you remember whether there was a dispute then as to a balance of any amount on the bill?

A. Yes sir, on the rental bill At that time we had the toll bills and rental bills separated and on the rental bill there was a balance of $4.00 she claimed she had paid. She told me she had paid it.

114 Q. Did you ask for the receipts?

A. Yes, sir.

Q. Did she produce them?

A. I believe she told me at that time that she didn't have time to look them up.

Q. About what month was that in 1907?

A. July 1907.

Q. Did you make any collection from her in July 1907?

A. I did, yes sir.

Q. What did you collect from her?

A. I collected four dollars.

Q. Do you know what time in the month it was you collected from her?

A. About the 15th.

Q. Who did you collect from?

A. Collected from Mrs. Danaher herself.

Q. Did you know her?

A. I am not personally acquainted with her. I know her.

Q. Is she in the court room now?

A. Yes sir.

Q. Is that the lady sitting there (indicating plaintiff)?

A. Yes sir.

Q. That was in July 1907?

A. Yes sir.

Q. The books will show the date?

A. Yes sir.

Q. Did you leave a receipt for the payment?

A. Yes sir.

115 Q. And that receipt was for how many dollars?

A. Four dollars.

(Mr. TERRY: We want to show there is a credit on the books, 15th of July, 1907, of four dollars.)

Q. There has been some testimony that Mrs. Danaher had gone east or north sometime in July 1907, you say you know this is the lady you collected from?

A. Yes sir.

Q. Was that collection turned in at or about the time it was made?

A. It was turned in on the same day.

Q. So that the bookkeeper got it right at once?

A. Yes sir.

Q. That date will show the date you collected it from Mrs. Danaher?

A. Yes sir.

Q. That is the time she said she had those receipts for the prior months but didn't have time to look them up?

A. Didn't have time to look them up, no sir.

Q. This is a book you keep for the telephone company, I believe, examine this account of Mrs. Danaher's?

A. Yes sir.

Q. What is the last entry on her account?

A. 12th of February.

Q. What year?

A. 1907—1908 I should have said.

Q. Where is that 1908?

A. This is the book for 1908.

116 Q. It begins in 1907 here?

A. This begins in 1907 and continues through the year 1907 and extends into 1908; that date is the 12th of February, 1908.

Q. Now it goes from that book into this one?

A. Here you are right here.

Q. What does the book show a balance there?

A. Shows a balance of four dollars in February.

Q. 1908?

A. Yes sir.

Q. What is this?

A. Four dollars balance March 1908, and the payment of $2.00 on the 13th of March.

Q. 1908?

A. Yes sir.

Q. Leaving a balance of $4.00 carried forward to April?

A. Yes sir.

Q. April shows what?

A. In April she paid $2.75.

Q. The rates were raised then?

A. Yes sir.

Q. Now it comes on down to where?

A. This is the last month in this ledger; then we come to this ledger here.

Q. What month is that?

A. April 1908.

Q. The first month in this ledger is May 1908?

A. Yes sir.

Q. What does that show?

117 A. Four dollars balance there.

Q. Now turn to the month where that matter was adjusted and what does the book show?

A. On the 8th of May the books show a credit of $1.00 from Mrs. Danaher with $4.75 allowance made by reason of her telephone being disconnected.

Q. All on that account or on account of this $4.00 being charged off also?

A. Four dollars was also charged off.

Q. That made a credit of $8.45?
A. Yes sir on the 4th she paid $2.75, making a credit of $8.45 plus $2.75.
Q. How did that leave the account?
A. That left the account paid ahead $4.45.
Q. Does it stay that way on your books there?
A. Yes sir, to the present date.
Q. That was made in giving her that $4.00 and also crediting her for the time her phone was not in service?
A. Yes sir.
Q. That was in May 1908?
A. Yes sir.
Q. That was the time Mr. Hughes went to her house?
A. I don't know.
Q. Did you have anything to do with the collections in March 1908?
A. No sir.
Q. Do you know anything about sending out a notice in March 1908?
118 A. No sir, I don't know.

Examination.

By Mr. WILLIAMS:

Q. What is that dollar for, that one dollar credit?
A. She didn't pay me that $1.00.
Q. Didn't she pay here on that date $2.75?
A. She paid $2.75 on the 4th.
Q. Ever pay you a dollar at any time?
A. No sir.
Q. What is the date of that dollar credit?
A. 8th day of May, 1908.
Q. There is a receipt for $2.75?
A. Yes sir, on the 4th it shows $2.75 credit.
Q. What is the date of $7.45?
A. On the 8th.
Q. Don't you know she never paid you any money?
A. She didn't ever pay me.
Q. Do you claim that this $1.00 was paid?
A. I don't know.
Q. Isn't that part of the credit you made for the forty days?
A. I made it at the same time I made the credit for the forty days.
Q. Where did that item come from?
A. The tickets for the credits come from the cashier's office into the bookkeeper's office.
Q. Was that $1.00 part of that credit?
A. I couldn't say.
Q. You don't know whether it was cash or not?
119 A. I am pretty sure it is cash or I would have been off balance.
Q. Do you think she paid you $1.00?

A. She paid the company one dollar.
Q. The books indicate that?
A. Yes sir.
Q. It isn't part of some credit you made somewhere?
A. No sir.
Q. When you went there in July 1907 you had a bill for what?
A. I think I had a bill for $8.00.
Q. What did that consist of?
A. At the top of the bill it reads "telephone service, rental—I don't know the exact phrase—for the month of July $2.00" under that would read "balance $6.00," making a total of $8.00.
Q. Your books show that $4.00 of that was for the current month of July, and for June?
A. Yes sir.
Q. Then it was really $6.00 old balance?
A. June and July and the old balance.
Q. That balance of $4.00 commencing back in January and February 1907?
A. Yes sir.
Q. Then the months of June and July?
A. Yes sir.
Q. She made no dispute about the June and July bills?
A. I don't know that she specified any months, but she said she didn't owe part of the balance.
Q. The old part of the balance?
A. Yes sir.
Q. What balance did she tell you she didn't owe?
120 A. None, in particular, the old balance.
Q. She paid you $4.00?
A. She said I don't owe this balance, I will pay you $4.00.
Q. Do you mean to say you don't know what balance she was disputing?
A. No sir, I don't know anything about the books at that time.
Q. Did you ask her any questions about receipts?
A. Asked her if she had receipts.
Q. Did you ask her what months she disputed?
A. No sir.
Q. Did you know what they were at that time?
A. No sir.
Q. Did you know you had June and July on your account?
A. I knew I had July in with the balance.
Q. Do you know what months this balance was for?
A. No sir.
Q. You don't know that?
A. I don't know positively, no sir.
Q. Positively? Now do you know at all?
A. I knew there was a balance but I couldn't say what months it was for.
Q. Did you know at that time that the balance dated back to January & February?
A. No sir, I did not.
Q. Knew nothing about it?

A. No sir, nothing about it.
Q. You didn't know that bill included June and July?
A. I knew it had July, but I didn't know whether it included June.
Q. You mean to say she handed you $4.00 and told you she didn't owe the balance?
121 A. Yes sir.
Q. How did she come to pay you $4.00, did she dispute the whole balance?
A. Not the whole balance, I didn't suppose——
Q. Do you know what she did dispute?
A. She disputed that balance?
Q. What balance?
A. The balance on that bill.
Q. The six dollars?
A. Yes sir.
Q. Disputed the balance and yet paid you $4.00?
A. She disputed the six dollars; she said "I owe four dollars and I'll pay you that.
Q. She didn't dispute the whole balance?
A. I guess not.
Q. Do you know?
A. She didn't dispute the whole balance.
Q. She admitted she owed you four dollars?
A. Yes sir she admitted that she owed four dollars.
Q. Now she admitted Mr. Sowall that she owed four dollars?
A. Yes sir, she did.
Q. She disputed four dollars?
A. I don't know how much she disputed.
Q. You don't know how much she disputed?
A. No one could tell that.
Q. You knew there was only four dollars disputed?
A. Yes sir.
Q. She didn't tell you what she was paying for?
122 A. No sir.
Q. You didn't know of course?
A. I didn't know then.
Q. You didn't know she was paying for June and July then?
A. No sir.
Q. Couldn't possibly know that?
A. No sir.

Witness Excused.

123 *Testimony of L. M. Loring.*

Mr. L. M. LORING, the next witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TERRY:

Q. What position do you occupy with The Southwestern Telegraph & Telephone Company?
A. Local Manager at Little Rock.
Q. How long have you held that position?
A. Since August 1907.
Q. As local manager had you had anything to do with the books or are you more or less familiar with what they show?
A. I employ the people that keep the books and the reports of the bookkeepers are turned over to me at the end of the month.
Q. Did you employ competent or incompetent, good or inferior bookkeepers?
A. I employed as good people as I could get at that time.
Q. Do you know anything about this account of Mrs. Danaher's?
A. Well it was never called to my attention until about March 13th, 1908. I believe it was reported to me and they asked if they should send a notice on account of the balance of four dollars that was due. I was told by——
(Never mind what you were told.)
Q. What did you do?
A. I said yes send the notice unless she can produce receipts to show she doesn't owe it.
Q. You directed that a notice be sent?
A. Yes sir.
Q. Know whether that notice was followed by letter or whether it was the custom to follow it up by a personal call?
124 A. The rules of the company are to follow up the notice on the day of expiration—that is my instructions to the men who handle that work and so far as I know she was called up.
Q. That is the general custom?
A. Yes sir.
Q. Do you know why it was not cut out on the 23rd of March but went over to the 30th of March?
A. I instructed the cashier to try and make a personal call on Mrs. Danaher and secure her receipts. It was held over on that account.
Q. Were you ever able to get those receipts?
A. No sir. I think the cashier went out once or twice but there was no one at home or he couldn't see Mrs. Danaher.
Q. Do you know of any other collectors asking for receipts?

Mr. WILLIAMS: You only know what they told you. If you don't know yourself, don't say.
(Question withdrawn).

Q. Was the lineman sent out afterwards to disconnect the phone and take it away?

A. Sent out on the 30th I believe.

Q. 30th of March?

A. Yes sir.

Q. What is the custom and practice in that case when you send a party out after a telephone?

A. The order to take out the phone for the non payment or otherwise, originates in my office. If there is a balance due on the account where the phone is ordered out I have a bill made out by the bookkeeper and attached to the take-out order; this is
125 turned over to the foreman who instructs his men to go out and get the phone and at the same time present the bill for the balance due. Of course an adjustment can be made with the man who goes to get the phone if they can produce any receipts.

Q. Has he authority to call for and examine those receipts?

A. Yes sir.

Q. So if he went there on the 30th and asked either for the phone or the receipts he had the right, or had authority from the office to get the receipts and allow them on their face value, or get the telephone?

A. To first call my office up by phone and get instructions from me what to do.

Q. That is after he sees the receipts?

A. Yes sir.

Q. In the event he gets neither the receipts or the telephone is that matter ever brought back to the bookkeeper so that he can charge it off, or does it stay there?

A. It stays there until the telephone is taken out. When it is taken out an order is sent back to the bookkeeper and then he takes it off his books.

Q. If this lineman didn't get the telephone when he went there he of course couldn't make a ticket for the bookkeeper to take that charge off of his books?

A. No sir.

Q. Where parties keep your lines, equipment and telephone instrument and decline to surrender them to you, what is the rule of the company about charging the rate against the party who so uses——

Mr. WILLIAMS: I object to that. They have no right to do that under the law.

126 The COURT: They can show what the practice is. Objection overruled.

To which action of the court plaintiff at the time excepted and asked that his exceptions be noted of record.

A. The charge is still made on the books until the card comes back stating that the telephone has been taken out.

Q. Now, Mr. Loring, turn to those books and explain to the jury how you adjusted this matter with Mrs. Danaher, and how the account was passed from a debit of $4.00 to a credit of $4.45, the books are open before the jury?

A. On this account of Mrs. Danaher's on the 8th day of May 1908, I instructed George W. Hughes to go out to see if he could not adjust the account or get any receipts or any evidence whatever that the balance in dispute had been paid. My reasons for doing so was because on the 4th day of May Mrs. Danaher had come in and paid $2.75 cash; also back in April, which does not show in this book, about April 20th, she made a payment, $2.75. I saw that those two payments would more than pay up this old balance and she would really be paying for telephone service she hadn't got and I thought we had better make another attempt to adjust the account or have some understanding about it, or stop taking her money, one thing or the other. Mr. Hughes went out and he gave me his interview in writing, I had asked for it in writing; I told him to take along what we call an allowance voucher and get Mrs. Danaher to sign the allowance for the time this phone was out of service and also for the balance. Mr. Hughes came back and reported to me in writing that Mrs. Danaher could not find the receipts and insisted that she had paid promptly all the time, and he also said that Mrs. Danaher was not a woman that would make those statements unless they were true. Upon his recommendation I passed through an allowance on the 8th of
127 May of $7.45 also $1.00, that was an allowance in cash. This allowance covered the discount that she was entitled to receive on those two payments in April and also in May, and that allowance I made there would have squared her account up and started her off on a new account beginning the 8th of May, 1908. She has continued to come in and pay right along and we have receipted her for $2.75 all along. The $4.45 was still to her credit ahead but she never took that up which she could have done just as easily. We haven't mailed her bills for the telephone except for long distance charges; but instead of that she has come in each month and made a payment and we have just simply given her a receipt on account for the amounts she has paid.

Q. Is that the reason you gave her a receipt on account subsequent to this May transaction because there is a balance in her favor?

A. There is $4.45 in her favor and we couldn't give her a receipt for any one special month.

Q. If there is money to her credit or a debit against her you give her a special receipt?

A. Yes sir, our company doesn't allow us to do anything else.

Q. After allowing this credit it really brought the company in debt to her rather than her in debt to the company?

A. Yes sir.

Q. She has never accepted the $4.45?

A. No sir.

Q. That is why she gets these special receipts every month?

A. Yes sir.

128 Cross-examination.

By Mr. WILLIAMS:

Q. Did you give any instructions at the office not to issue anything but special receipts?

A. Whether the account is not paid in full or whether there is a credit balance I issue the receipts or instruct the men under me to do so.

Q. Those receipts are issued by those men under your directions?

A. Yes sir.

Q. When did you issue orders to that effect?

A. Well those are the general instructions; that order wasn't issued especially for her, on Mrs. Danaher's account, that is a rule of handling our business.

Q. Did you promulgate that rule?

A. No sir.

Q. Did you give any orders about it at all?

A. I saw that it was enforced.

Q. You see it is enforced by instructing the men to carry it out?

A. Yes sir.

Q. When did you do that?

A. At the time we changed systems of accounting, along about April 1st, 1908. Prior to that time the same instructions were in force. The previous manager had issued those instructions to the employees and it was absolutely necessary that they should do so.

Q. You stated only one of those special receipts was issued, or at least only one on the form of a special receipt?

A. Well, we can either give a special receipt or receipt the bill on account by cash.

129 Q. In other words where there is a disputed account and a person pays you you won't give them a receipt in any other way except on account?

A. Not unless they can produce evidence that the account in dispute has been paid.

Q. Your men would not make a receipt unless they bring up evidence in the way of prior receipts that they have paid that account?

A. If they do they do it contrary to instructions.

Q. A man can't get a receipt in any other way then?

A. That is right.

Q. You didn't issue any special orders in regard to Mrs. Danaher's account?

A. No sir.

Q. How do you figure out that $1.00?

A. I would have to look at the ledger.

Q. Where are those items separated?

A. Here is an allowance of cash discount.

Q. How do you know what that dollar is?

A. I know that we made an allowance *for* one dollar and I know what it is supposed to represent.

Q. You know it is not cash?
A. It represents a discount.
Q. That don't represent any money she paid?
A. No sir, it represents the discount she was entitled to.
Q. This $2.75 here?
A. This $2.75 here is the May charge, this is the total bill $6.25.
Q. Wherever this $2.75 appears as credit it represents the payment she made?
130 A. Yes sir, $2.25 cash, fifty cents discount.
Q. That $1.00 discount was paid, she paid the full amount?
A. Yes sir, April 20th and May 4th.
Q. That is the discount you declined to give her?
A. That is the discount we didn't give her.
Q. She got that when she paid these bills and brought the bill?
A. I don't know, some of our patrons bring their bills and some of them don't. They are supposed to have them with them.
Q. You mailed Mrs. Danaher her bills, that is they were mailed out of the office right along?
A. Since the time that these allowances were made it is my understanding the bills have not been mailed for the simple reason she had a credit balance she was entitled to.
Q. Prior to that time you were sending out bills?
A. Well for the month of April and probably for the month of May the bill was mailed to her.
Q. On your books you continued charging her all the time for the use of the phone?
A. Yes sir.
Q. Just as thought she was getting service?
A. Yes sir.

Redirect examination.

By Mr. TERRY:

Q. Did she actually have your telephone in her house?
A. Yes sir.
Q. Was the line of cable laid and the telephone still connected to her house?
A. Yes sir all the equipment was there, except she was disconnected.
131 Q. Where was that disconnection?
A. In the office.
Q. She had your equipment holding it and prohibiting you from getting it?
A. Yes sir.
Q. Did you print this form of special receipt yourself or was it sent to you from headquarters?
A. The form was authorized by our auditor's department.
Q. Who furnishes you those forms, who delivers them to you?
A. I think those receipts that we had at that time, I think they were printed in Little Rock by the Democrat Printing Company,

but at the present time we get all those by requisition furnished by the general office.

Q. Did you get up those special receipts for any special occasion or are they used for people in the same circumstances as Mrs. Danaher—what is the object of that receipt?

A. It has been used in connection with payments on account.

Q. When did you get this form of special receipt?

A. That form was gotten in April 1908.

Q. Prior to that you just receipted on your old bills?

A. Yes sir.

Q. Balance and credit so much?

A. Yes sir.

Q. The first special receipt is dated in May?

A. I think they were probably begun to be used in May, but we had them on hand for use during the month of April.

Q. Do you know whether you had them as early as the middle of April in use?

A. No sir, I do not.

132 Q. I notice a special receipt in July, 1908, also?

A. This payment here was made to a collector. This statement was made up and put in the hands of a collector who probably didn't have with him a pad of special receipts and he just simply marked it "paid in cash $2.75, 4/29/08, W. C. Green, Collector." That was the same as a special receipt.

Q. That from $2.75 left a balance of $4.00.

A. Yes sir.

Recross-examination.

By Mr. WILLIAMS:

Q. Your patrons pay you for ornamenting their homes with your instruments only?

A. Well, we give them telephone service along with the telephone.

Q. That is what you get your money for, isn't it?

A. Partly, yes sir, and equipment.

Q. You don't get $2.75 less fifty cents discount, if paid on or before a certain date, just simply because you stick a telephone in a man's house?

A. No sir.

Q. You expect to render service?

A. Yes sir.

Q. Did you continue charging Mrs. Danaher this $2.75 and receive it from her merely because you left the telephone still in her house?

A. If she had permitted us to take it out the charge would not have been made. It would have been what we call an advance rental allowance.

133 Q. Then simply because it was in the house you continued to charge her for it?

A. The charge remains on the books and is put there each month until the telephone is removed. When it is removed the date of

disconnection or the date of removal is—an allowance is made back to that date, so really when the transaction is concluded there is no charge made against that account.

Q. You did this notwithstanding the fact you had disconnected her phone in the office?

A. Yes sir.

Q. Was that phone of any more service to her than an old empty bucket after you had broken the connection?

A. No sir.

Q. Of absolutely no service whatever?

A. No sir.

Q. You continued charging her?

A. Yes sir.

Q. Took her money?

A. She came in and paid on account.

Q. You sent her a bill, didn't you?

A. Yes, she owed us.

Q. She owed you for what?

A. Our books showed she owed a balance on account of $4.00.

Q. You called in $5.50?

A. She came in and paid us $5.50.

Q. You now say the reason for carrying that on the book was because the telephone was in her house?

A. Yes sir.

Q. She had nothing to do with the act of disconnecting it?

134 A. Yes sir, she did.

Q. Did she come down there and disconnect it?

A. If she had produced her receipts it would not have been disconnected.

Q. You wouldn't have disconnected it?

A. No sir.

Q. You are the people that did the disconnecting?

A. Yes sir.

Q. Any way she had of preventing you from doing that?

A. I don't think so.

Mr. TERRY: Object to that.

Redirect examination.

By Mr. TERRY:

Q. Was Mrs. Danaher treated any differently in this matter from any other person who was similarly situated, who hadn't paid their bills and didn't produce or wouldn't produce their receipts?

A. No sir.

Q. You pursued identically the same course with her that you do in any other case where parties are delinquent?

A. Yes sir.

Q. Who fail to pay or fail to produce their receipts?

A. Yes sir.

Recross-examination.

By Mr. WILLIAMS:

Q. You charge people who you have cut off and are refusing to give them service the same that you do people you are giving service?

A. We do until the phone is removed.

135 Q. Then a man that didn't get the service because you have cut him out is charged the same on your books with the man that is getting your service?

A. We make the charge on our books until the phone is removed.

Q. Without regard to whether you are giving service?

A. Yes sir.

Q. Then a man who has a telephone in his house, after you have rendered it useless, as long as it stays in his house you exact of him in your books the same pay that you do of the man you are giving service to?

A. Yes sir.

Q. Do you take out the phones in every instance where they can't produce receipts, or disconnect them?

A. Yes sir, we do.

Q. I will ask you if Mr. Shiell didn't have a dispute and wasn't able to produce his receipts and you didn't take out his phone or disconnect it?

A. He had to produce some other evidence that would tend to show he had paid the bill.

Q. Then you don't always stand on the receipts?

A. We didn't stand on the receipts in Mrs. Danaher's case.

Q. You shut off her phone because she didn't produce them?

A. Yes sir.

Q. At the time you adjusted her account did you have any better evidence than you did at first?

A. I had more conclusive evidence and had it in hand where I could decide better.

Q. What evidence was it?

A. As I said before, Mr. Hughes had gone out and seen

136 Mrs. Danaher and asked her to produce her receipts and she said she couldn't do so. He had quite a long talk with her and she claimed positively she had paid the bill and she had made those two payments; he came back and reported to me that Mrs. Danaher was a lady whose reputation was not such that she would state an untruth about a payment.

Q. That, of course, made an impression upon you?

A. Yes sir, it did, to a certain extent.

Q. Is there any reason why you couldn't have had that before you shut this telephone off?

A. We made two or three attempts to get it.

Q. Did you ever send anybody out there to have the same interview that Hughes had with her?

A. Yes sir.

Q. Did they report that she was a lady whose word could be received?

A. They probably were not as well acquainted with her as Mr. Hughes was.

Q. He was in your office at the time?

A. Yes sir.

Q. He could have been sent out then?

A. He was on other duties.

Q. You knew all the time that this lady was disputing the correctness of this bill?

A. It wasn't called to my attention until about March 13th, when the notice was sent, the first notice that I know about being sent.

Q. Did you make any inquiry in the office to ascertain whether that bill was unpaid and why?

A. We went according to our books. We sent a notice the same as we do to everyone that our books show delinquent; then it
137 is up to the subscriber to produce the receipts and show that the account had been paid.

Q. You didn't wait for that in this case?

A. We waited seven days after the notice had expired.

Q. You never did get those receipts?

A. No sir.

Q. You satisfied yourself some other way?

A. As far as I am concerned, yes sir.

Redirect examination.

By Mr. TERRY:

Q. You say when the instrument is not surrendered you continue charging on your books until it is surrendered?

A. Yes sir.

Q. When it is surrendered you enter the rebate?

A. Yes sir.

Q. Did you pursue any different course in this case than in all other cases in like situation with respect to continuing that charge on your books?

A. No sir.

Q. And rebate it later?

A. No sir.

Witness excused.

Defendant rests.

This was all the testimony adduced in the trial of this cause.

138 *Instructions—Requested by Plaintiff.*

Whereupon the plaintiff requested that the Court instruct the jury as follows:

No. 1.

If you find from the evidence that plaintiff paid to the defendant its regular rental charges for telephone service at plaintiff's residence for the months of March, April and May, 1908, and complied with all reasonable rules and regulations of defendant, and that the de-

fendant cut off plaintiff's telephone connection on the 30th day of March, 1908, and thereafter refused to permit the plaintiff to use her telephone or to furnish her telephone service until the 8th day of May, 1908; and if you further find from the evidence that during said period of time while the plaintiff's telephone was so cut off by the defendant, the defendant was furnishing telephone service to other residents of the City of Little Rock who complied with its reasonable rules and regulations, and paid, for service like that demanded and paid for by plaintiff, the same charges as were paid by plaintiff, then your verdict will be for plaintiff.

The Court refused to give instruction No. 1, so requested by plaintiff, to which action of the Court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 2.

If you find from the evidence that plaintiff paid to the defendant its regular rental charges for telephone service at plaintiff's residence for the months of March, April and May, 1908, and complied with all reasonable rules and regulations of defendant, and that the defendant cut off the plaintiff's telephone connection on the 30th day of March, 1908, and thereafter refused to permit the plaintiff
139 to use her telephone or to furnish her telephone service until the 8th day of May, 1908; and if you further find from the evidence that during said period of time while the plaintiff's telephone was so cut off by the defendant, the defendant was furnishing telephone service to other residents of the city of Little Rock who complied with its reasonable rules and regulations, and paid, for service like that demanded and paid for by plaintiff, the same charges as were paid by plaintiff, and that such refusal to furnish telephone service to plaintiff was a discrimination against her, then your verdict will be for the plaintiff.

The Court refused to give instruction No. 2 so requested by plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 3.

If you find from the evidence that the plaintiff paid to the defendant all proper charges for telephone service at plaintiff's residence for the months of March, April and May, 1908, and all months previous thereto, and complied with all reasonable rules and regulations of defendant, and that the defendant cut off plaintiff's telephone connection on the 30th day of March, 1908, and thereafter refused to permit plaintiff to use her telephone, or to furnish her telephone service until the 8th day of May, 1908; and if you further find, from the evidence, that during said period of time while the plaintiff's telephone was so cut off by defendant, the defendant was furnishing telephone service to other residents of the city of Little Rock, who complied with its reasonable rules and regu-

lations, and paid, for service like that demanded and paid for by plaintiff, the same charges as were paid by plaintiff, then your
140 verdict should be for the plaintiff.

The court refused to give instruction No. 3 so requested by the plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 4.

If you find from the evidence that the plaintiff paid to the defendant all proper charges for telephone service at plaintiff's residence for the months of March, April and May, 1908, and all months previous thereto, and complied with all reasonable rules and regulations of defendant, and that the defendant cut off plaintiff's telephone connection on the 30th day of March, 1908, and thereafter refused to permit plaintiff to use her telephone, or to furnish her telephone service until the 8th day of May, 1908; and if you further find from the evidence, that during said period of time while the plaintiff's telephone was so cut off by defendant, the defendant was furnishing telephone service to other residents of the city of Little Rock, who complied with its reasonable rules and regulations, and paid, for services like that demanded and paid for by plaintiff, the same charges as were paid by plaintiff, and that such refusal to furnish telephone service to plaintiff was a discrimination against her, then your verdict will be for plaintiff.

The court refused to give instruction No. 4 so requested by plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 5.

If you should find from the evidence that there was a dispute between the plaintiff and defendant as to whether the plaintiff had paid her telephone rentals for some of the months previous
141 to March 1908, and that defendant, notwithstanding such dispute, continued to furnish plaintiff with telephone service and collect charges therefor for many months after such dispute started, then you are instructed that, by so continuing to furnish telephone service to plaintiff, and to receive and collect charges therefor, the defendant waived its right to cut off or discontinue plaintiff's telephone service because of her alleged failure to pay such disputed bills. Defendant's proper remedy in such circumstances was an action at law to recover such rentals, and not a refusal to furnish further service.

The court refused to give instruction No. 5 so requested by plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 6.

If you believe from the evidence that, at the time of paying the amounts shown to have been paid by plaintiff to defendant in the month of March, 1907, the plaintiff refused to pay a balance shown thereon of $4.00 alleged by defendant to have been due for the months of January and February 1907, basing her refusal upon the ground that she had paid all charges due for January and February, 1907, but acknowledging the correctness of the charge for the month of March, and paid to the defendant's collector the sum acknowledged to be due for March, that was a complete application of the payment to the satisfaction of the charge for the month of March, and the defendant, upon accepting the payment, was bound to apply it accordingly; and the same rule applies to all payments made for the months subsequent to March 1907.

142 The court refused to give instruction No. 6, so requested by plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 7.

The court instructs the jury that if they find from the testimony that Mrs. Danaher paid for her telephone according to the usage and custom established by defendant for its patrons generally, then she was entitled to the same service given to such other patrons, and a failure to give her such service under those circumstances was a discrimination against her; and if the proof establishes the fact that the defendant did not give her such service, she having paid her bills as above set forth, then she is entitled to a verdict, and you should find for the plaintiff.

The court refused to give instruction No. 7, so requested, by plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

No. 8.

If you find for the plaintiff, your verdict will be for the sum of one hundred dollars per day for each day or part of a day that the defendant refused to furnish telephone service to the plaintiff, while service was being furnished to other persons, that being the penalty provided by law in such cases.

The court refused to give instruction No. 8, so requested by plaintiff, to which action of the court plaintiff at the time excepted and asked that her exceptions be duly noted of record which is accordingly done.

143 Whereupon, at the request of the defendant, and over the objection of plaintiff, the court instructed the jury as follows:

The Court instructs the jury that under the evidence in this case your verdict will be for the defendant.

To the giving of which instruction plaintiff at the time excepted

and asked that her exceptions be duly noted of record which is accordingly done.

Thereafter, in due time, on April 24, 1909, plaintiff files her motion for a new trial, which was in words and figures as follows, to-wit:

144 Pulaski Circuit Court.

ADELIA P. DANAHER, Appellant,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY,
Defendant.

Motion for New Trial.

Comes the plaintiff and moves the court to set aside the verdict herein rendered, and grant her a new trial, for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The court erred in permitting counsel for defendant to ask Charles Vedder, a witness for defendant, if he remembered sending a notice to plaintiff on the 13th day of March, 1908, over the objection of plaintiff.
4. The court erred in permitting counsel for defendant to ask —— Hammond, a witness for the defendant, if mistakes were not made in Bookkeeping in other businesses, over plaintiff's objections.
5. The court erred in permitting L. N. Loring, a witness for defendant, to testify, over the objection of plaintiff, that it was a rule of defendant to charge the same price for instruments kept by persons without service, as was charged for instruments and telephone service.
6. The court erred in refusing, over plaintiff's objections,
145 to give instructions numbered 1, 2, 3, 4, 5, 6, 7 and 8, and in refusing to give each of same, as asked by plaintiff.
7. The court erred in instructing the jury, at defendant's request and over the objection of plaintiff, to find for the defendant.

J. E. WILLIAMS,
AUSTIN & DANAHER,
PALMER DANAHER,
Attorneys for Plaintiff.

146 *Motion for New Trial Overruled.*

The motion for a new trial coming on for hearing before the court, after argument of counsel, the court being well and sufficiently advised in the premises, doth overrule said motion, to which action of the court, the proponent at the time saved his exceptions. and prayed an appeal to the Supreme Court which was granted. Time being asked, 90 days from April 24, 1909, was given for filing of bill of exceptions herein.

Now within the time allowed by the court, comes the plaintiff and presents this bill of exceptions, containing all the evidence, and instructions, and exceptions saved during the trial, and asks that the same be signed, sealed and made a part of the record in this cause, be signed, sealed and made a part of the record in this cause, which which is accordingly done.

Given under my hand, this 29th day of June, 1909.

ROB'T J. LEA,
Judge Pulaski Circuit Court, 1st Div.

O. K.
WALTER J. TERRY,
Att'y for S. W. Te. & Te. Co.
June 29, '09.

"Filed June 29th, 1909.
F. J. GINOCCHIO, *Clerk,*
By J. H. SHOPPACH, *D. C.*"

147 *Clerk's Certificate.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, F. J. Ginocchio, clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the foregoing transcript contains a true, correct and complete copy of all the pleadings and record in the case of Adelia P. Danaher vs. The S. W. Tel. & Tel. Co., as the same appear of file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of said court, this 8th day of July, 1909.

[SEAL.] F. J. GINOCCHIO, *Clerk,*
By O. L. McNAIR, *D. C.*"

The Southwestern Telegraph and Telephone Company hereby waives service of Summons and enters its appearance in this cause in Supreme Court of Arkansas.

August 16, 1909.

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY,
By WALTER J. TERRY, *Attorney.*

148 *Fee Bill.*

P. H. Carnes, Clerk, ($2.50 p'd by Pl'ff)	$3.20
F. J. Ginocchio, Clerk (50c. p'd by D'f't)	10.60
This Transcript	40.00
Witnesses	12.00
C. C. Kavanaugh (P'd by Pl'ff)	.60
B. L. Roberts, Sheriff	1.80
	$68.20

Attest:
F. J. GINOCCHIO, *Clerk,*
By O. L. McNAIR, *D. C.*

149 *Record Entries Sup. Court.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the Supreme Court of the State of Arkansas, begun and held on the 22nd day, being the fourth Monday of November, A. D. 1909, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit:

On the 14th day of February, 1910, a day of said term:

ADELIA P. DANAHER, Appellant,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Appellee.

Appeal from Pulaski Circuit Court, First Division.

On motion and for cause shown the submission of this cause is passed until February 28th inst., with leave to argue the same orally on that day; and

On the 28th day of February, 1910, the following proceedings were had, to-wit: (Omitting caption):

This cause being regularly called, come the parties thereto by the attorneys, and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement; and

On the 28th day of March, 1910, the following proceedings were had, to-wit: (Omitting caption):

150 This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, First Division, and was argued by counsel, on consideration whereof it is the opinion of the court that there is error in the proceedings and judgment of said Circuit Court in this cause in this: Said Circuit Court erred in directing the jury to return a verdict for defendant, whereas the evidence adduced by plaintiff was sufficient to entitle her to a submission of the issues in the case to the jury for a verdict

It is therefore considered by the court that the judgment of said Circuit Court in this cause rendered, be and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs and that this cause be remanded to said Circuit Court for a new trial and for further proceedings to be therein had according to law and not inconsistent with the opinion herein delivered.

It is further considered that said appellant recover of said appellee all her costs in this Court in this cause expended and have execution thereof.

151 In the Supreme Court of Arkansas, March 28, 1910.

No. 263.

DANAHER
v.
SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

Opinion.

BATTLE, *J.*:

Adelia P. Danaher brought this action against the Southwestern Telegraph & Telephone Company to recover the statutory penalty for discrimination against the plaintiff by refusing to furnish her telephone service for a period of forty days. Plaintiff alleged in her complaint that she is, "and for many years has been, a subscriber to the defendant's telephone exchange in Little Rock, and as such had a telephone instrument in her residence, furnished by defendant, and was at all times upon her call furnished with connections to all other telephones in said exchange until March 30, 1908, when the defendant disconnected said telephone and arbitrarily refused to permit plaintiff to use same, continuing so to refuse her service until the 8th day of May, 1908, when it again connected her telephone with its exchange; that plaintiff paid defendant the rent upon said telephone for said months of March, April and May, 1908, and fully complied with all of defendant's rules and regulations; that defendant refused to permit plaintiff to use said telephone during all of said time from March 30th, 1908, to May 8, 1908, both days included, and refused on each and all of said dates to answer any call *my* by plaintiff through said telephone or to call plaintiff at the request of any other subscriber asking for connection with said telephone. That, by virtue of the statutes of
152 this State, it is made the duty of defendant to furnish all applicants telephone connections, service and facilities without discrimination or partiality, provided such applicants comply with all of defendant's reasonable rules and regulations; that the defendant discriminated against plaintiff each day of said period of forty days in this, that other persons who were subscribers to said telephone exchange were permitted to use their telephone at their residences and were given connections through said exchange, provided they paid to defendant the rental price for such telephones and service, as plaintiff did, and that such other subscribers were permitted to have connection with the telephones of other subscribers in the city of Little Rock and elsewhere for the purpose of transmitting messages and communicating through said telephones to all persons having telephones upon their payment of an amount of money equal to that paid by plaintiff for like service during said period, while during the above mentioned period, and on each and every day thereof, the defendant refused to allow plaintiff to use her telephone and kept it disconnected from its switchboard, so that no call made by plaintiff was received at the exchange of defendant, and defendant during all of said time refused to connect plaintiff's

telephone with that of any other subscriber; that during all of said time defendant furnished to other subscribers in like situation such service and connections. That by reason of such discrimination defendant has subjected itself to a penalty of one hundred dollars for each and every day during said period. And plaintiff prayed judgment for $4,000.

Defendant answered, denying all the material allegations of the complaint, and stated that on March 13, 1908, plaintiff paid the defendant $2, for which it receipted her, and at that time and on several prior occasions it notified her that there was a balance
153 of $4 due defendant from plaintiff for two months' prior telephone rentals; that plaintiff denied this indebtedness, claimed to have receipts covering it, and promised from time to time to produce them, but failed and refused to do so; that one of its rules is to refuse telephone service to such persons as neglect or refuse to pay their telephone rentals for preceding months; that this rule is reasonable and necessary, and was known to plaintiff, and was part of a contract existing between her and defendant; that on March 20 it notified plaintiff that she was indebted to it for two months' rental, amounting to $4, and that if same was not paid on March 30, 1908, her telephone service would be discontinued; that on March 30, 1908, plaintiff was again reminded of her delinquency, and again notified that if the bill was not paid her service would be discontinued; that she failed and refused to make payment of such past due rentals, and for that reason service was refused her."

Mrs. Danaher, the plaintiff, testified that she resides in Little Rock, and has been a subscriber of the defendant for a number of years, and that she was a subscriber during the months of March, April and May, 1908, and had a telephone in her residence; that she paid to the telephone company its regular charges for her telephone for every month since she first had the telephone; and that she paid the charges for March, April and May, 1908; that the defendant, claiming that she was indebted to it in the sum of four dollars for services rendered in some month in the past and she claiming that she had paid it and refusing to pay it again, discontinued her telephone -vice on the 30th day of March, 1908, in the afternoon, until May 8, 1908, about two o'clock in the afternoon, when it was resumed; and during all that time her neighbors were furnished with telephone service. Other evidence was ad-
154 duced by both parties. The court instructed the jury trying the issues in the case to return a verdict in favor of the defendant, which they did, and judgment was rendered accordingly, and plaintiff appealed.

The telephone company, in devoting its property to a use in which the public has an interest, becomes a public servant, and is bound to serve the public impartially. It is like common carriers in that it is bound to serve those applying to it impartially and upon equal terms.

In State v. Nebraska Telephone Co. in 17 Neb. 126, the court said: "That the telephone, by the neces-ities of commerce and public use, has become a public servant, a factor in the commerce of the

nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and, in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

In Chesapeake, etc. Telephone Co. v. Baltimore, etc. Co. 66 Md. 399, it is said: "The appellant, (the telephone Company) is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. * * * The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to per-
155 form impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and, while offering (themselves as) ready to serve some, refuse to serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

Section 7948 of Kirby's Digest provides: "Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situation; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination, and refuses such facilities after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

A telephone company, being a public servant, cannot refuse to serve any one of the public in that capacity in which it has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It cannot
156 refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services it has a right to demand no more than the rate of charge fixed for such services. It transcended its duty to the public when it demanded more. State v. Citizen's Telephone Co. 85 Am. St. 870; State v. Nebraska Telephone Co. 17 Neb. 126; State v. Kinloch Telephone

Co. 93 Mo. App. 349; Jones on Telegraph and Telephone Companies, sec. 251, and cases cited.

A tender or payment to the telephone company of its rate or charge for service or rent of telephone for any particular time and offer to comply with its reasonable rules and regulations would entitle the applicant to such service or rent. Should the telephone company incur a penalty by refusing to rent or render such service, it could prevent the increase thereof by renting or offering to rent the telephone or rendering or offering to render the applicant such service.

The evidence adduced by the plaintiff was sufficient to entitle her to a submission of the issues in the case to the jury for a verdict. The court erred in instructing the jury to return a verdict for the defendant.

Reverse and remand for a new trial.

157 In the Supreme Court of Arkansas.

978.

ADELIA P. DANAHER, Appellant,
vs.
THE SOUTHWESTERN TE. & TEL. CO., Appellee.

Petition for Rehearing.

Comes the appellee, The Southwestern Telegraph & Telephone Company, and asks leave to withdraw from the files of this court, its petition for re-hearing filed herein, on the 4th day of April, 1910, and file this its substituted petition for re-hearing, and in that behalf prays the court to set aside the order and judgment of the court in such cause, made on the 28th day of March, 1910 and grant it a re-hearing, and for grounds of said petition, appellee says:

1st. That the court erred in holding that the appellee could not refuse service to appellant during the time appellant was indebted to appellee for rentals for the two months prior service.

2nd. The court erred in holding that for the present service the appellee had the right to demand no more than the rate of charge fixed for such service, and in holding that the appellee did demand any more for the present service than the rate fixed for such service.

3rd. The court erred in holding that a tender or payment to the appellee of its rate of charge for service or rent of telephone for any particular time, and offer to comply with its reasonable rules and regulations, entitled the appellant to such service or rate, regardless of the charges due the appellee for prior services for rent,
158 and in holding that the appellant complied or offered to comply with the reasonable rules and regulations of the appellee, in that, all the evidence showed that the appellant refused to either pay for the past due rentals shown on the appellee's books, or to produce receipts or any evidence showing that appellant had paid for the same.

4th. The court erred in holding that the evidence in this case showed or tended to show that appellee had discriminated against appellant, in that all the evidence showed that appellee in its dealing with appellant, treated her exactly as it treated all other persons and subscribers in like situation, and similarly situated, to appellant and under like circumstances, as those complained about in appellant's complaint herein, and that the court erred in holding that there was any discrimination shown or tended to be shown by the evidence in this case, between the appellant and other persons in like situation with appellant.

5th. The court erred in holding that appellee in refusing telephone service to appellant discriminated, or showed partiality against appellant, or that the appellee imposed any condition or restriction upon the appellant that it did not impose impartially upon all persons or companies in like situation with appellant. That is to say, that the evidence shows that all persons or companies who were indebted to appellee for two months or more past telephone rentals, were like appellant, in every instance refused future service, unless said other persons or companies, in like situation with appellant, should first pay such past due rentals.

6th. The court erred in holding that appellee's rule re-
159 quiring the payment of past due telephone rentals as a condition for furnishing future service, was unreasonable or that said rule or regulation was expressly or impliedly prohibited under the penal laws of this State, or that the appellee knew or should have known that said rule was unreasonable, or that the adoption and enforcement of the same was prohibited under the penal laws of this State.

7th. That the court erred in holding that the enforcement by the appellee of a rule which it had in good faith adopted, and which the evidence showed it enforced against all persons in like situation with appellant, was in contravention of section 7948 of Kirby's Digest, or of any other penal statute of the State.

8th. The court erred in holding that the bona fides and good faith of the appellee in enforcing a rule which, as the evidence showed, it had in good faith adopted, and was impartially enforcing against all persons in like situation with the appellant, was no defense to an action for the penalty sued on herein.

9th. The court erred in holding that the penal laws of this State are sufficiently definite and certain to apprise the appellee or any other telephone company in advance, as to whether the rule plead in this case, or any other rule or regulation is reasonable or unreasonable, and in holding that the appellee and others engaged in the telephone business, regardless of its bona fides and good faith, adopts and enforces such a rule or regulation or any other rule or regulation at its peril.

10th. The court erred in holding that the charge of the trial court,
directing a verdict for the appellee, under the pleadings and
160 evidence in this case, was improper and in reversing the same.

Wherefore, the appellee prays that said order and judgment of

this court, be set aside and held for naught, and that it have such other and further relief under the law, as it may be entitled to.

WALTER J. TERRY,
Attorney for Appellee.

I, Walter J. Terry, attorney for appellee herein, certify that in my opinion the foregoing petition for re-hearing is well founded in law, and is respectfully and in good faith, presented to this court for its consideration.

WALTER J. TERRY.

Filed April 9, 1910. P. D. English, Clerk.

161 And on the 4th day of April, 1910, the following proceedings were had, to-wit: (Omitting caption).

Comes the appellee by attorney and files a petition for rehearing, and, on request, is allowed two weeks' time in which to brief same.

And on the 18th day of April, 1910, the following proceedings were had, to-wit: (Omitting Caption).

On motion, the appellant is granted one week's time in which to file her briefs in response to the petition for rehearing.

And on the 25th day of April, 1910, the following proceedings were had, to-wit: (Omitting Caption).

The petition for rehearing filed herein being called, is submitted upon the briefs filed and is by the Court taken under advisement.

And on the 9th day of May, 1910, the following proceedings were had, to-wit: (Omitting caption).

Rehearing Denied.

Being fully advised, the petition for rehearing filed in this cause is by the Court denied.

162 *Caption.*

Pleas before Hon. Guy Fulk, Judge of Second Division, Pulaski Circuit Court, in the case of

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY,
Defendant.

Trial May 10th, 1911.
Judgment for Plaintiff $6,300.00.

163 *Mandate of Supreme Court.*

Pulaski Circuit Court, Second Division, March Term, 1910, Thursday, May 12th, 1910.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Defendant.

On this day comes plaintiff by her attorneys and files herein the mandate of the Supreme Court of Arkansas, which is in words and figures as follows, to-wit:

STATE OF ARKANSAS,
In the Supreme Court, sct:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Courthouse in the City of Little Rock, on the 22nd day, being the fourth Monday of November, A. D. 1909, amongst others, were the following proceedings, to-wit: On the 28th day of March, A. D. 1910, a day of said term:

ADELIA P. DANAHER, Appellant,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Appellee.

Appeal from Pulaski Circuit Court, 1st Division.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, 1st Division and was argued by counsel; on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said
164 Circuit Court in this cause, in this: Said Circuit Court erred in directing the jury to return a verdict for defendant whereas the evidence adduced by plaintiff was sufficient to entitle her to a submission of the issues to the jury for a verdict.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby for the error aforesaid, reversed annulled and set aside with costs; and that this cause be remanded to said Circuit Court for a new trial and for further proceedings to be therein had according to law, and not inconsistent with the opinion therein delivered.

It is further considered that said appellant recover of said appellee all her costs in this Court in this cause expended and have execution thereof.

In testimony that the above is a true copy of the judgment of said Supreme Court rendered in the case therein stated,

I, P. D. English, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Little Rock, this 12th day of May, A. D. 1910.

[SEAL.] P. D. ENGLISH, *Clerk.*

165 *Filing Amendment to Complaint.*

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

SATURDAY, *December* 17, 1910.

Comes the plaintiff by her attorneys Danaher & Danaher, and by leave of Court file herein an amendment to her complaint; and on motion of plaintiff, the Court orders that the depositions of all witnesses out of this County be taken on interrogatories; and plaintiff also files herein her interrogatories to be propounded to Lula Bab Danaher.

166 Pulaski Circuit Court.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Defendant.

Amendment to Complaint.

For amendment to the complaint heretofore filed herein, plaintiff states:

That defendant discriminated and showed partiality against plaintiff during the entire month of April, 1908, and the first eight days in the month of May, 1908, in this:

That other persons in the City of Little Rock, subscribers to said telephone exchange, were permitted to use their telephones at their residences in said city, and were given connections through said exchange, provided they paid to defendant, on or before the 15th day of each of said months, respectively, the rental price $2.25 per month for such telephones and service for said months.

The plaintiff, before the 15th day of April, 1908, offered to pay to defendant the said sum of $2.25, as the rental price for her said telephone and service, but defendant refused to accept said sum, and demanded the sum of $2.75 as the rental for said month, and plaintiff was forced to pay, and did pay, defendant said sum of $2.75, as the rental for said month, and said other subscribers were permitted to have connection with the telephones of other subscribers in said City of Little Rock, and elsewhere, for the purpose
167 of transmitting messages and communicating through telephones to all persons having telephones, upon their payment of the rental price of $2.25 per month, while during said month of April, 1908, and on each and every day thereof, notwithstanding the payment of a larger amount of rental by plaintiff, the defendant refused to allow plaintiff to use said telephone, and continuously kept same cut off from its switch-board, so that no call made by plaintiff was received at the central office or exchange

of defendant and the employees of said defendant at said central office or exchange during all of said time refused to connect plaintiff's telephone with that of any other subscriber who called for such connection, while during all of said time, defendant furnished to other subscribers in like situation, such service and connections.

The plaintiff, before the 15th day of May, 1908, offered to pay to the defendant the said sum of $2.25 as the rental price of her said telephone and service, but defendant refused to accept said sum, and demanded the sum of $2.75, as the rental for said month, and plaintiff was forced to pay, and did pay, defendant said sum of $2.75, as the rental for said month, and said other subscribers were permitted to have connection with the telephones of other subscribers in said city of Little Rock, and elsewhere, for the purpose of transmitting messages and communicating through telephones to all persons having telephones, upon their payment of the rental price of $2.25, while, during said first eaight days of May, 1908, and on each and every day thereof, notwithstanding the payment of a larger amount of rental by plaintiff, the defendant refused to allow plaintiff to use said telephone, and continuously kept same cut off from its switch-board, so that no call made by plaintiff was received at the central office or exchange of defend-
168 ant, and the employees of said difendant at said central office or exchange during all of said time refused to connect plaintiff's telephone with that of any other subscriber who called for such connection, while, during all of said time, defendant furnished to other subscribers, in like situation, such service and connections.

Wherefore, plaintiff prays judgment as in original complaint and for $2,300.00 for the days in May after the 8th upon which she was discriminated against as aforesaid.

DANAHER & DANAHER,
Attorneys for Plaintiff.

Endorsed: "Filed Dec. 17, 1910. F. J. Ginocchio, Clerk. L. J. Gibson, D. C."

169 *Filing Amended Answer.*

Pulaski Circuit Court, Second Division, March Term, 1911, Wednesday, May 3rd, 1911.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Defendant.

Comes defendant by its attorney, W. J. Terry, and by leave of Court files herein its amended answer.

170 In the Pulaski Circuit Court, Second Division.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Defendant.

Amended Answer.

Answering the complaint and the amendment to the complaint filed herein, the defendant denies that on March 30, 1908, or at any other time, it arbitrarily disconnected plaintiff's telephone, No. 1950, or that it arbitrarily refused to permit the plaintiff to use the same from March 30, 1908, to May 8, 1908, or for any other time. It denies that the plaintiff paid to defendant the amount due it for telephone service for the months of March, April and May, 1908, and it denies that she complied, or offered to comply, with the reasonable rules and regulations of the defendant company.

It denies that it has discriminated or shown partiality against the plaintiff in any manner whatever, or that it has granted telephone connections, service and facilities to other persons in like situation with the plaintiff.

Defendant says that on March 13, 1908, the plaintiff was indebted to the defendant for telephone service and rental theretofore rendered her for the months of January, February and March, 1908, at the rental rate of $2.00 per month, making a total of $6.00 due it for the rentals of the months aforesaid; that by the terms of its contract said rentals were due and payable in advance; that in March,

171 1908, the defendant had, in the City of Little Rock, Arkansas, more than five thousand (5,000) telephone subscribers or patrons, to-wit: five thousand four hundred and fifty-two (5452) such s-cribers, of which the majority were, like the plaintiff, subscribers to residence telephones all of whom were paying the same rates on the same terms as was the plaintiff.

That notwithstanding the defendant's contracts with its various subscribers stipulated for, and that said various subscribers agreed to, payment for their said telephone rentals monthly in advance,

that a large per cent of said subscribers were in the habit of paying in arrears and on any day from the first to the last day of the current month, and that this had been the custom and rule in the City of Little Rock for many years prior to said day in March, 1908; that it was necessary that the defendant should treat its subscribers alike, when similarly situated, and that it was necessary for the defendant to keep books, records and accounts showing credits and debits between it and each of its subscribers, as aforesaid.

That under the statutes of the State of Arkansas and under the common law, the defendant was permitted to establish reasonable rules and regulations for the conduct and government of its business of supplying the public with telephones; that neither the statutes nor the common law aforesaid specified what was or what was not a reasonable rule and regulation.

That for many years prior to March, 1908, the defendant had established and enforced a rule and regulation whereby all the patrons who were in arrears to it for telephone rentals should be notified in writing of such fact, and also by like notice advised that if said rentals so in arrears were not paid by a day named in said written notice that the defendant would decline to serve such subscribers until such delinquent subscribers had paid said rentals
172 so in arrears. That on the 13th day of March, 1908, the plaintiff was in arrears, and defendant's books showed that she was in arrears, for the months of January and February, 1908, and that on said day the defendant notified the plaintiff that she was indebted to it in the sum of $4.00 for the two months prior telephone rental, and also owed $2.00 for the current month of March, 1908; that plaintiff admitted her indebtedness for the current month of March, 1908, and paid to defendant $2.00, which it credited on account, but denied that she was indebted to the defendant for any prior months and claimed that she held receipts showing the same to have been paid, and represented and promised to produce said receipts. That long prior to March, 1908, the defendant had notified the plaintiff that she was paying two months in arrears and that there was two months past telephone rentals due, and that for many months prior to March, 1908, the plaintiff had denied this indebtedness and had repeatedly promised to produce and show her receipts, and that the defendant had repeatedly called at the residence of the plaintiff and asked to be shown said receipts, and had repeatedly presented its bill to the plaintiff showing $2.00 due for the current month, $4.00 due for the past months, during all which time, to-wit: from the 30th of March, 1907, down to and including the 13th of March, 1908, the plaintiff had promised to produce the receipts of the defendant showing that its charge for said arrears was erroneous; that, having failed or refused so to produce said receipts and to show the defendant that its said charge was erroneous and that the plaintiff was not so indebted to it, the defendant, on the said 13th of March, 1908, at its office in the city of Little Rock, again notified the plaintiff in person that
173 she was so indebted to it, and on the same day the defendant mailed to the plaintiff its written notice, in the usual form,

advising her that she was so indebted to it in the sum of $4.00 telephone rentals for the months of February & March, 1908, and notifying her that if the same was not paid on or before the 23rd day of March, 1908, her said telephone service would be discontinued, which said notice was received by the plaintiff; that on the 23rd day of March, 1908, the defendant called the plaintiff by telephone and again notified her that her telephone rental was past due and unpaid and that if the same was not paid her telephone service would be discontinued until the same was paid; that thereupon the plaintiff again claimed that she had paid said bill and promised to produce said receipts, and that the defendant thereupon declined to disconnect her telephone and again waited upon the plaintiff to produce said receipts or other evidence that she was not so indebted. That on the 30th day of March, 1908, the plaintiff having wholly failed and refused to produce said receipts or other evidences that she had paid said telephone rentals, the defendant presented its bill to the plaintiff with the request that she then produce said receipts or evidences showing that she was not indebted for said bill, or that she pay said bill, and that the plaintiff then and there declined to produce said receipts or evidences showing that she was not indebted to the defendant, or to pay said bill, and that the defendant thereupon disconnected her telephone and refused to furnish her telephone service because of plaintiff's failure and refusal to pay therefor, and for no other reason.

Further answering the defendant says that it is not true that on the 15th of April, 1908, or at any other time, it demanded
174 the sum of $2.75, or any other amount, as rental for the month of April, 1908, and it denies that the plaintiff was forced to pay, or that she did pay, the defendant the said sum of $2.75, or any other sum, as the rental for said month, and it further alleges the facts to be that on or about the 4th of April, 1908, the plaintiff tendered to the defendant $2.25 for the telephone rent for the current month of April, which amount the defendant declined to accept as payment for the April rental and then and there advised the plaintiff that it would accept no rental for the month of April but that it would apply the same on account of the indebtedness then due for the months of February and March, 1908, and that thereupon the plaintiff declined to pay the defendant said $2.25, or any other amount; that later, towards the latter part of the month, defendant's clerk, by error, mailed a bill to the plaintiff for $6.75, showing $4.00 balance and $2.75 for the current month, upon which bill the plaintiff paid on or about the 29th day of April, 1908, the sum of $2.75, well knowing that she had received no telephone service since the 30th of March, 1908, and well knowing that said $2.75 was not received by the defendant on said account of the April rental, but that it was being received and applied by the defendant on account of its claim for past indebtedness, and that the plaintiff well knew that telephone service was refused her during the month of April, 1908, solely for the reason that plaintiff had refused to pay her rentals for February and March, 1908,

and well knew that the defendant at no time demanded any sum of her for telephone rental for the month of April, 1908.

Further answering, the defendant says that it is not true that on the 15th day of May, 1908, or at any other time, it demanded the sum of $2.75, or any other amount, as rental for the
175 month of May, 1908, and it denies that the plaintiff was forced to pay, or that she did pay, the defendant the said sum of $2.75, or any other sum, as the rental for said month, and it further alleges the facts to be that on or about the 2nd of May, 1908, the plaintiff tendered to the defendant $2.25 for the telephone rent for the current month of May, which amount the defendant declined to accept as a payment for May rental, and then and there advised the plaintiff that it could accept no rental for the month of May, but that it would apply the same on account of the indebtedness then past due and that thereupon the plaintiff paid the defendant the said sum of $2.75, which the defendant declined to receive as a payment for the month of May, but accepted, received and receipted her for and on account of the balance due on said past indebtedness, the plaintiff well knowing that the defendant was not charging her $275, or any other amount, for telephone service for the month of May, 1908, and well knowing that the defendant was declining to serve her for the month of May, 1908, unless she would first pay said past due rentals.

Further answering the defendant says that on the 8th day of May, 1908, it appearing that the plaintiff had paid all past indebtedness due it for telephone rentals, the defendant again connected up the plaintiff's telephone instrument with the exchange of the defendant in the city of Little Rock, on and from which day it has continued to serve the plaintiff with telephone connections and facilities in every respect as it does every other person who is a subscriber to its said exchange.

Further answering the defendant says that it had, for many years prior to March, 1908, un-formly enforced against all persons similarly situated with the plaintiff, its rule and regulation
176 refusing to furnish future telephone service where parties were, like plaintiff, shown to be indebted to it for past service, until such persons had paid said past indebtedness, and had uniformly required such persons similarly situated with the plaintiff to pay said past indebtedness as a condition upon which such future service would be rendered, and that, in the enforcement of this rule and regulation, it did not discriminate against the plaintiff and in favor of others, but that it uniformly enforced said rule and regulation; and the defendant says that said rule and regulation was adopted and enforce by it in good faith and under the belief that it had the right to adopt and enforce said rule and regulation under the statutes of the State of Arkansas, and under the common law, and that neither the statute of the State nor the common law applicable thereto had prohibited the adoption or enforcemenet of such a rule or regulation in specific and certain terms, and that neither the statute of the State nor the common law applicable thereto had prohibited the adoption or enforcement of such a rule or regulation,

and that the defendant did not know, and had no means of knowing, that such a rule or regulation was meant to be prohibited by the statutes of Arkansas nor by the common law applicable to such case.

Wherefore, the defendant denies that it is liable to the plaintiff in this action for that both the statutes of the State and the common law are so indefinite and uncertain it was impossible for the defendant to know in advance of the judgment of the court whether its said rule and regulation would be held to be reasonable or unreasonable there being no standard fixed either by the statutes or the common law by which to determine in advance the reasonableness or unreasonableness of its said rule and regulation, and the
177 defendant says that the infliction of the penalties prescribed by the statute sued on herein would be unconstitutional and void and would be the taking of the property of this defendant without due process of law, and would deny it the equal protection of the law, in violation of the Constitution of the United States and particularly in conflict with the Fourteenth Amendment thereof.

For further answer the defendant says that by virtue of Section 1 of the act of the General Assembly of the State of Arkansas, approved March 31, 1885, entitled, "An Act granting certain privileges to and prescribing certain duties of telegraph and telephone companies, and for other purposes," the privileges therein named were conferred upon persons and individuals as well as upon corporations, but that by Section 11 of said Act, which is Section 7948 of Kirby's Digest, and which is the statute relied on by the plaintiff in this suit, the duties and penalties are only imposed upon corporations, and that said Section 11 of said act and Section 7948 of said Digest, in imposing such penalty upon a corporation engaged in the telephone business and not imposing any such penalty upon any individual or person engaging in a like business, denies to this defendant and other telephone corporations the equal protection of the law and is contrary to and in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States; and that in exempting individuals and persons engaged in the telephone business from such penalty, its grants, privileges and immunities to such individuals and persons which are not granted to corporations engaged in the telephone business, and that said exemption of individuals and persons from the penalties of said act is arbitrary and unjust and that in imposing such penalties upon corporations engaged in the telephone business and not imposing such pen-
178 alties upon individuals and persons engaged in the telephone business, the Legislature arbitrarily discriminated against such corporations and in favor of such persons and individuals, and that it thereby denies to this defendant and other telephone corporations the equal protection of the law, and is contrary to and in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States; and that, in arbitrarily exempting persons and individuals engaged in the telephone business from such penalty, it grants privileges and immunities to such persons and individuals which are not granted to corporations engaged in

the telephone business and is, therefore, contrary to and in conflict with Section 18 of Article 2 of the Constitution of the State of Arkansas, and is also contrary to and in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Having fully answered, the defendant asks to be discharged with its costs.

WALTER J. TERRY,
Attorney for Defendant.

Endorsed: "Filed May 3, 1911. F. J. Ginocchio, Clerk. L. J. Gibson, D. C.

179 *Trial.*

3882.

Mrs. ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

TUESDAY, *May 9th*, 1911.

On this day comes the plaintiff by her attorneys Danaher & Danaher, and Dan W. Jones & W. S. Danaher, and comes defendant by its attorney W. J. Terry and this cause now coming on to be heard, both parties announce ready for trial, whereupon a jury of twelve good and lawful men all of the regular panel of petit jurors in this Court are duly selected, empaneled and sworn to try the issues of fact arising herein and after hearing all the testimony adduced, the hour of adjournment having arrived further proceedings herein are postponed until tomorrow morning at nine-thirty o'clock, and the jurors after receiving the due admonition of the court are permitted to separate until that time.

180 *Judgment.*

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Defendant.

WEDNESDAY *May 10th*, 1911.

On this day come the parties hereto by their respective attorneys and come also the jury empaneled herein and the further trial of this cause is now resumed.

And after hearing the argument of counsel and receiving the instructions of the Court the jury retire in charge of the Sheriff to consider their verdict and after deliberating thereon, return into open court the following verdict, viz:

"We the jury find a verdict in favor of the plaintiff as follows: From March 30th to May 8th, 1908, inclusive making forty days at $100.00 One hundred dollars per day for non-service making $4,000.00 four thousand dollars and from May 9th to May 31, 1908, inclusive, 23 days at $100.00 one hundred dollars per day making $2,300.00 twenty-three hundred dollars for discrimination. Making a total verdict of $6,300.00 sixty-three hundred dollars in favor of the plaintiff.

A. B. BEELER, *Foreman.*"

It is therefore considered, ordered and adjudged by the Court that plaintiff, Adelia P. Danaher, do have and recover of and from defendant, Southwestern Telegraph & Telephone Company the sum of Sixty-three hundred and no/100 Dollars ($6,300.00) as a statutory penalty, and that plaintiff recover of defendant all her costs in this cause expended, for all of which execution may issue.

And thereupon on motion of defendant, the court grants defendant until July 1st, 1911, to file herein its motion for a new
181 trial of this cause.

Filing Motion for New Trial.

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TEL. & TEL. CO., Defendant.

FRIDAY, *June 30th,* 1911.

Comes defendant by its attorney W. J. Terry and by leave of Court files herein its motion for a new trial.

(For Motion for New Trial see page 120.)

182 *Motion for New Trial Overruled.*

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TE. & TEL. CO., Defendant.

SATURDAY, *July 1st,* 1911.

On this day defendant's motion for a new trial of this cause now coming on to be heard the Court being well and sufficiently advised doth overrule said motion. To which ruling of the Court defendant at the time excepts and asks that its exception be noted of record which is hereby done. And thereupon defendant prays an appeal

to the Supreme Court of Arkansas which is by the Court granted and defendant is allowed until the first day of the September 1911 term of this Court to present and file herein its bill of exceptions.

183 Pulaski Circuit Court, Second Division, September Term, 1911.

3882.

ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE Co., Defendant.

Filing Bill of Exceptions.

MONDAY, *September* 25, 1911.

Comes defendant by its attorney, Walter J. Terry, and presents to the Court its bill of exceptions herein. And the Court, upon examination thereof, doth find the said bill of exceptions to be in all things correct; whereupon same is signed by the Judge, and the Clerk of this court is ordered to file same as a part of the record in this cause, which is hereby done.

184 In the Pulaski Circuit Court, Second Division.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Defendant.

Bill of Exceptions.

This cause coming on for hearing on the 9th day of May, 1911, before the Honorable Guy Fulk, Judge presiding and a jury empaneled, the plaintiff appearing by Messrs. Danaher & Danaher, Dan W. Jones and Walker Danaher, and the defendant appearing by Walter J. Terry and E. B. Downie, Esquires; both sides announcing ready for trial, the following evidence was introduced, proceedings had and exceptions saved, as follows, to-wit:

The plaintiff, to sustain the issues upon her part, introduced the following testimony:

185 *Testimony of Miss Lulu Babb Danaher.*

Miss LULA BABB DANAHER, being first duly sworn, testified as a witness on behalf of plaintiff, as follows:

Direct examination.

By Mr. DANAHER:

Q. What is your name?
A. Lula Babb Danaher.
Q. What kin are you to Mrs. Adelia P. Danaher, plaintiff in this case.
A. Daughter.
Q. Where did you live during the months of March, April and May, 1908?
A. 23rd and Izard.
Q. The same place with your mother, Mrs. Danaher?
A. Yes, sir.
Q. Who attended to the paying of the telephone bills—first I will ask you, was there a telephone in your residence during these months?
A. Yes, sir.
Q. Was it in operation?
A. Not during March, April and May.
Q. How long had it been in your residence before that?
A. For several years.
Q. When did they cease operating that telephone?
A. The 30th of March, 1908.
Q. When was the operation of that telephone resumed?
A. 8th of May.
186 Q. What was the matter with it during this time—was the telephone in the house?
A. The phone was there, but we couldn't get connection.
Q. Did you try to use it during that time?
A. Yes, sir, every day.
Q. Would you get any response from Central office?
A. No, sir.
Q. Were the telephone bills paid for these months?
A. Yes, sir.
Q. I hand you a paper and ask you to identify it—state what it is?
A. (Examining paper.) This is March, I paid the March bill at the office.
Q. What is that paper?
A. It is supposed to be a receipt.
Q. Receipt for what?
A. It doesn't say—just says to March 31st.
Q. Read what it says—all it says?
A. (Reading:) It says, "To rental of telephone instrument and exchange service month ending March 31, 1908, $2.00."

Q. What does it say before that lines—just before that?
A. (Reading:) "Balance due of bills previously rendered $4.00."
Q. Making a total of how much?
A. Making a total of $6.00.
Q. Then does this show any payment?
A. No, says, Balance of $4.00.
Q. By what——
A. By "C"—by cash I suppose, $2.00.
Q. What is the date of that receipt?
187 A. March 13th, 1908.
Q. Who paid that $2.00?
A. I did.
Q. Where did you pay it?
A. At the office.
Q. Office of the Telephone Company?
A. Yes, sir, the Telephone Company.
Q. At the time you made that payment, was there any application of the payment made by you to any particular part of the time that the telephone service was rendered for?
A. I said I wanted to pay for March.
Q. What year?
A. 1908.
Q. And this receipt was given you at that time?
A. Yes, sir.
Q. I hand you another paper and ask you to identify that—what is that?
A. (Reading:) "April $2.75, rental balance as per bill Rendered $4.00, total, $6.75, paid in cash $2.75; net amount paid $2.75."
Q. I see here that says $2.75, and the previous month was just $2.00?
A. They went up to $2.75, and if you paid before the 15th of the month you got a rebate.
Q. Got a rebate of how much?
A. Fifty cents.
Q. What date does it show that bill was paid?

By Mr. TERRY: What bill is it?
Mr. DANAHER: The April bill.

A. That was paid the 29th.
188 *A*. 29th of April.
A. Yes, sir.
Q. Who paid that bill?
A. Mother paid that.
Q. Did you make any effort to pay it before that date?
A. Yes, sir; I went to the office and tendered him $2.25 and he said I wasn't entitled to the discount unless I paid the back bill.
Q. When did you make the trip to the office and offer to pay the $2.25?
A. The first of the month.
Q. Was it before the 15th?
A. Yes, sir.
Q. And at that time they refused to take the $2.25 but demanded the $2.75?

A. Yes, sir, but I wouldn't pay it.
Q. You said this bill was afterwards paid by your mother?
A. Yes, sir.
Q. Now I hand you another receipt for May, 1908.
A. That receipt was received from the Telephone Company for the month of May, 1908.
Q. Who made that payment?
A. I did.
Q. What is the amount of that payment?
A. I paid $2.75.
Q. Does that show the date of payment of that?
A. Yes, sir, 2nd of May.
Q. That is the receipt you got when you made the payment?
189 A. Yes, sir.
Q. Where did you make that payment?
A. At the office.
Q. At the time you made that payment was there anything said by you as to what you were paying for?
A. I told them I wanted to pay that month of May.
Q. Month of May, what year?
A. 1908.
Q. And this is the kind of receipt they gave you for it?
A. Yes, sir; they still told me I couldn't have the discount.
Q. You offered to pay them this?
A. Yes, sir, and they said I couldn't have the discount.
Q. How much did you offer to pay them first?
A. I offered to pay $2.25 and they said I wasn't entitled to the discount and I had to pay the $2.75.
Q. At the time you went to the office now the first of April and offered to pay the $2.25, did you say anything to the people at the office there then about what you offered to pay for?
A. I said I was paying for the present month of April.
Q. What year?
A. 1908.
Q. They wouldn't take that amount I believ- you say?
A. No.

By Mr. DANAHER: I offer in evidence the two receipts for March and May that have been identified by this witness.
(See Exhibits "A" and "C" to Mrs. Adelia P. Danaher's testimony.)

190 Cross-examination.

By Mr. TERRY:

Q. Miss Danaher, you state you called up the Telephone Company every day, or attempted to call central office every day from March 30th until May 8th?
A. Yes, I did.
Q. Did you do that yourself personally?
A. Yes, sir.
Q. You made an effort to call them up every day?

A. Yes, sir.
Q. You still say you did?
A. I think I did, yes, sir.
Q. What was your object in calling up every day?
A. To see if I could get anybody when I wanted to talk.
Q. You were already figuring on $100.00 a day?
A. No, I didn't know anything about it then.
Q. Had your brother advised you to come down and tender this money so you could get $100.00 a day?
A. No, sir.

By Mr. DANAHER: I don't think that line of evidence is material and I object——
By the COURT: The objection is sustained.
By Mr. TERRY: I want to show the interest of the witness, she said she did this every day.
By the COURT: Save your exceptions to the ruling of the Court.
By Mr. TERRY: Exceptions saved.

Q. When you tendered this money in April, Miss Danaher, you say you stated you wanted to pay the April account?
191 A. Yes, sir.
Q. What did they have to say to you about that?
A. They said I wasn't entitled to the discount unless I paid the back bill.
Q. They gave you a receipt for April—or gave you a receipt on account?
A. They gave a receipt on account I think it was.
Q. In April?
A. Yes, sir, in April.
Q. I thought they didn't give you a receipt—you didn't pay that bill?
A. In April I didn't pay the bill.
Q. Then you are mistaken about paying the bill and they giving you a receipt?
A. They wouldn't accept the $2.25.
Q. They wouldn't accept the $2.25 unless you paid the back bill?
A. No, sir.
Q. When you went in, in April they declined to accept your money unless you paid the back bill?
A. They declined to accept the $2.25, and wouldn't give me the discount.
Q. When they declined to accept the $2.25, what did you decline to do?
A. I wouldn't pay them, I said I was entitled to the discount.
Q. What time was that you said you offered to pay them before the 15th of April?
A. It was along the first sometime—the first of April.
Q. What do you mean by sometime the first part of April—between the 1st and 5th?
192 A. I don't remember now just when it was.
Q. You think it was between the 1st and 5th?
A. Yes, sir.

Q. At any rate it wasn't later than the 10th?
A. No, sir,—along the first week in April.
Q. The first seven days in April?
A. Yes, sir.
Q. Now you did pay the money in May, 1908?
A. Yes, sir.
Q. You paid that on the 2nd of May?
A. Yes, sir, paid $2.75.
Q. And you took from them this receipt (indicating)?
A. Yes, sir.
(Reading.) "On account $2.75"—And you also paid the March bill I believe you say?
A. Yes, sir.
Q. Are you sure you paid that?
A. Yes, sir.
Q. Wasn't your mother there in the office?
A. No, she was in the buggy.
Q. Didn't she come in the office and talk to Mr. Vedder?
A. If Mr. Vedder talked to her she was in the buggy—I paid the bill.
Q. Your mother didn't come in there in March?
A. No, sir.
Q. You paid this money in March you say and what did they say at that time?
A. I don't think there was any conversation about it—it was before the telephone was cut off.
193 Q. It was the day they sent you the notice—March 13th?
A. I don't remember the date of the notice.
Q. This receipt you introduced here is the one you got at that time?
A. Yes, sir.
Q. (Reading) "$4.00 balance, $2.00 for March 1908, total $6.00, by "C," means by cash, $2.00, Balance $4.00, Chas. Vedder, 3/13/08." You knew your telephone was disconnected on the 30th of March?
A. Not until I tried to call.
Q. You knew it on the 30th or 31st of March?
A. Yes, sir.
Q. On the 31st of March you knew it was disconnected?
A. Yes, sir.
Q. And you tried to call Central office on the 1st of April?
A. Yes, sir.
Q. On the 2nd?
A. Yes, sir.
Q. The 3rd, 4th, 5th, and on down to the 7th and in fact every day?
A. Yes, sir.
Q. When you went in there in April and tendered this money, you knew you were not getting any service at that time?
A. Yes, sir.

Q. You knew they were seeking to make you pay this back bill when you went down to Central office?

A. What is it?

Q. I say you knew they were trying to make you pay this back bill then?

A. Yes, sir.

194 Q. You testified in this case once before did you not Miss Danaher?

A. Yes, sir.

Q. Didn't you testify then that they refused to take the money unless you paid the back bill in April?

A. I don't remember saying that.

Q. It was fresher in your mind then than now, was it not—When you testified a year or so ago?

A. Yes, sir, it was.

Q. Wouldn't your recollection be as good then as it is now?

A. I suppose it would—I just offered to pay them $2.25 though.

Q. Now on page 26—in your former testimony you were asked this question: Q. Did you get receipts showing those payments to be applied to any particular months?" and you answered, "A. No, they refused to give them to me for that month." And then a further question, "Q. They refused to issue receipts showing what month it was for?" "A. Yes, sir." and "Q. Did that happen in each and every instance?" "A. Yes, sir."—Did you testify to that the other time?

A. Yes, sir.

Q. Now you went off for the summer the latter part of July, 1907—you and your mother?

By Mr. DANAHER: I object to that.

By the COURT: I don't see that has any application to this case at all.

By Mr. DANAHER: That is entirely irrelevant what happened in 1907.

By the COURT: The objection is sustained.

By Mr. TERRY: I offer to prove the past indebtedness prior to July 1907.

195 By Mr. DANAHER: I object.

By the COURT: The objection is sustained.

By Mr. TERRY: Exceptions noted.

Q. Were you at home on March 30th, 1907, when the bill was first presented to your mother showing a balance?

By Mr. DANAHER: I object to that.

By the COURT: Objection overruled.

By Mr. DANAHER: It is back in 1907, a year before the telephone was cut off.

By the COURT: The objection will be sustained then.

By Mr. TERRY: Exceptions noted.

By Mr. TERRY: Your honor, to save time, can it be agreed that we can prove all that was proven in the other case——

By the COURT: I don't know what was provedn. We had better retire from the presence of the jury and see what you want to prove.

Here the Court and parties retired from the presence of the jury and the following proceedings were had in chambers:

196 Before the Court in Chambers.

By Mr. TERRY: We offer to prove what is set up in our answer, under our rule requiring subscribers to pay for past indebtedness.

By Mr. TERRY: We offer to prove that on March 13th, 1908, the plaintiff was indebted to defendant for telephone rentals for the months of January, February and March, 1908.

By Mr. DANAHER: We object.

By the COURT: Objection sustained.

By Mr. TERRY: Exceptions noted.

By Mr. TERRY: We offer to prove that while its contracts with its various subscribers and its contract with the plaintiff, stipulated for payment of telephone rentals monthly in advance, that a large per cent of said subscribers were in the habit of paying in arrears and that that had been the custom and rule in the City of Little Rock, Arkansas, for many years prior to March, 1908.

By Mr. DANAHER: We object.

By the COURT: The objection is sustained.

By Mr. TERRY: Exceptions noted.

By Mr. TERRY: We offer to prove that defendant kept books, records and accounts showing credits and debits between it and each of its subscribers.

By Mr. DANAHER: That is admitted.

By Mr. TERRY: That defendant offers to prove that many years prior to March, 1908, the defendant had established and en-
197 forced rules and regulations whereby all patrons who were in arrears to it for telephone rentals should be notified in writing of such fact, and also by like notice advising if said rentals were not paid on date named in such written notice, that defendant would decline to serve such subscribers until delinquent subscribers had paid said rental so in arrears, and that defendant uniformly declined to serve such delinquent subscribers in the future unless the past due rental was paid.

By Mr. DANAHER: That is not admitted, we will object to that.

By the COURT: Objection sustained.

By Mr. TERRY: Exceptions noted.

By Mr. TERRY: We offer to prove that it was the rules and regulations of the defendant where it had disconnected a subscriber's telephone for non-payment of past rentals, to refuse such subscriber future telephone service except on condition that such delinquent should pay such past due indebtedness.

By Mr. DANAHER: We object.

By the COURT: Everything in regard to any rule is inadmissible, and I will sustain the objection.

By Mr. TERRY: Exceptions noted.

By Mr. TERRY: We offer to prove that on the 13th of March, 1908, the plaintiff was in arrears, and defendant's books showed that she was in arrears for the months of January and February 1908, and that she was also owing $2.00 for March 1908, and that on that day she paid $2.00 at which time she denied she was owing the past due indebtedness; and thereupon the defendant receipted
198 her for $2.00 as a credit on account of her bill of $6.00, and that plaintiff claimed she had receipts showing that she was not indebted to defendant for any month prior to March, 1908, and represented and promised to produce said receipts; that this claim on the part of the defendant for past indebtedness of $4.00 for two months telephone rental had begun in March, 1907, and extended down to March, 1908, during which time the defendant had often called on the plaintiff, presenting its bills showing such past indebtedness and asking the plaintiff to produce said receipts. That plaintiff had frequently promised to produce said receipts or evidence showing she was not so indebted but that plaintiff failed to do this. That this extended down to the 13th of March, 1908, on which date the defendant again notified plaintiff of such past indebtedness, and on which date it mailed to the plaintiff its usual written notice, advising her of such indebtedness and that if same was not paid on or before the 23rd of March, 1908, her said telephone service would be discontinued, which notice was received by the plaintiff and that on the 23rd of March, 1908, the date of expiration of said written notice, in pursuance of its usual custom the defendant called the plaintiff by telephone and again notified her that her telephone rental was past due and unpaid, and that if the same was not paid her telephone service would be discontinued until the same was paid; that thereupon the plaintiff again claimed she had paid said bills and promised to produce said receipts, for which reason the defendant extended the time when it would disconnect her service and refuse her future service, from the 23rd of March to the 30th of March, 1908; that on the 30th of March, 1908, the plaintiff having wholly failed and refused to produce said receipts or evidences showing she had paid such
199 past due telephone rental the defendant pursuing its usual course and custom presented its bill to the plaintiff with a request that she produce her said receipts or evidence showing she was not indebted for said bill, or that she pay said bill, and that the plaintiff then and there declined to produce said receipts or evidences showing she was not indebted to defendant and declined to pay said bill, and that defendant thereupon disconnected her telephone service and refused to furnish her future telephone service for the reason she had not paid her past bill and for no other reason.

Mr. DANAHER: We object.

By the COURT: I will make the same ruling as before.

By Mr. TERRY: Exceptions noted.

By Mr. TERRY: We offer to prove that for many years prior to March, 1908, it the defendant had uniformly enforced against all persons similarly situated with the plaintiff, the rules and regulations with reference to furnishing future telephone service where parties were, like plaintiff, shown to be indebted to it for past service,

until such person had paid such past indebtedness, and had uniformly required such persons similarly situated with the plaintiff, to pay such past indebtedness as a condition upon which such future service would be rendered, and that, in the enforcement of such rule and regulation it did not discriminate against the plaintiff, but that it uniformly enforced such rule and regulation; and that such rule and regulation were adopted and enforced by it in good faith and under the belief that it had a right to adopt and enforce said rule and regulation.

200 By Mr. DANAHER: We object.

By the COURT: I will make the same ruling.

By Mr. TERRY: Exceptions noted.

Agreed State of Facts.

It is agreed that during the months of April and May, 1908, the defendant had in operation in Little Rock, Arkansas, more than 5000 telephones, a majority of which were in private residences; that under the rules of the defendant during these months all resident telephone subscribers were charged $2.75 per month, from which a deduction of 50 cents per month was made in all cases where the rentals was paid by the subscriber on or before the 15th of said month.

It is agreed as a fact in the case that the defendant Telephone Company cut off plaintiff's telephone on the 30th day of March, 1908, and refused to give plaintiff further telephone service thereafter until the 8th day of May, 1908, for the reason that defendant claimed that plaintiff owed it for telephone services theretofore rendered, which claim on the part of the Telephone Company was disputed by the plaintiff, she claiming that she did not owe the Telephone Company for any services rendered in the past.

By the COURT: All the testimony offered which has been refused by the Court is refused because in the case of Danaher v. The Southwestern Telegraph & Telephone Company, decided by the Supreme Court March 28th, 1910, which is the case at bar, the Court say:

Referring to the Telephone Company—"It cannot refuse to serve him—(referring to plaintiff herein) until he pays a debt

201 contracted for services rendered in the past. For the present services it has a right to demand no more than the rate of charge fixed for such services. It transcends its duty to the public when it demanded more.

A tender or payment to the telephone company of its rate or charge for service or rent of telephone for any particular time and offer to comply with its reasonable rules and regulations would entitle the applicant to such service or rent." Which opinion of the Supreme Court is found in the 94th Arkansas, page- 533-538.

By Mr. TERRY: Exceptions saved to all the testimony refused by the Court.

Here the Court and parties returned into Court and the following proceedings were had in the presence of the jury.

Adjournment for noon recess.

202 Afternoon Session.

Testimony of Miss Lula Babb Danaher.

Miss LULA BABB DANAHER, re-called:

Redirect examination.

By Mr. DANAHER.

Q. You were asked this morning by Mr. Terry if you didn't make certain statements that he asked you about in your testimony at the other trial of this case; he didn't read all the testimony you gave at that trial did he?

A. No.

Q. He asked you this morning if you made this answer, "I went the first of April and they refused to take the money unless I paid the back bill," and you said you believed you did; didn't you further explain at that time in answer to a question, "Q. Did you offer them the money at that time? A. "Yes, sir, they refused to give the discount and I wouldn't pay the regular bill because it was the first of the month"?

A. I did.

And further deponent sayeth not.

203 *Testimony of Mrs. Adelia P. Danaher.*

Mrs. ADELIA P. DANAHER (Plaintiff) being first duly sworn, testified in her own behalf as follows:

Direct examination.

By Mr. DANAHER:

Q. What is your name?

A. Mrs. A. P. Danaher.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Did you pay the telephone bill due the defendant for the month of April, 1908?

A. Yes, sir.

Q. What date did you pay it on—is that the receipt—(handing witness receipt)?

A. Yes, sir.

Q. Does it reflect the true date?

A. Yes, sir.

Q. Can you see without your glasses?

A. No.

Q. Please read it?

By Mr. TERRY: How can she identify it, she stated she couldn't see to read without her glasses.

By Mr. DANAHER:

Q. Can you read it without your glasses?
A. No.
Q. Have you got your glasses with you?
A. Yes.
Q. Put you- glasses on and look at it and see what date it is?
204 A. (Reading:) Four and then a straight mark and then 29—4/29.
Q. Is that the receipt that was given you at the time you made that payment?
A. Yes, it looks like it.
Q. At the time you made that payment in April 1908, did you make any application of that payment to any particular date—did you make any statement to the collector as to what you were paying for?
A. No, I just paid it.
Q. Well did he present this bill to you?
A. (No answer).
Q. Did he bring a bill when he came to collect the money?
A. Yes.
Q. Did the bill have an old balance on it?
A. Yes, sir. It must have been $6.75.
Q. I mean the old balance—the whole bill was $6.75—it shows on its face—don't it show an old balance of $4.00—put on your glasses and look at it?
A. Yes, sir, that is $6.75.
Q. What is there—(indicating)?
A. $4.00.
Q. What does it say that is—read here (indicating).
A. "Rental balance as per bill rendered, $4.00."
Q. What is up above here—(indicating)?
A. $2.75.
Q. What is that for?
A. April.
Q. And a balance of $4.00, now what is the total bill?
A. $6.75.
205 Q. How much did you pay at that time?
A. $2.75.
Q. Was there any conversation had between you and the man you paid it to about that old balance of $4.00?
A. I don't remember any.
Q. What I am trying to get at, did you tell him what you were paying the $2.75 for?

By Mr. TERRY: I object to his asking the question twice, and also to his leading her.

By Mr. DANAHER:

Q. Now this is for the month of April, now I want to know what item of the bill you paid that for?

A. (No answer.)
Q. The question is, these two items on this bill for the month of April, showing the old balance of $4.00 and the $2.75, when you paid the $2.75, did you tell the collector what you were paying?
A. Yes, I was paying for that month.
Q. The question is, did you tell the collector what you were paying it for?
A. Why—yes.

By Mr. TERRY: I wish to object to that answer—also to the question as it is leading.
By the COURT: Save your exceptions.
By Mr. TERRY: Exceptions noted.

Cross-examination.

By Mr. TERRY:

206 Q. Mrs. Danaher, when your telephone was disconnected on the 30th of March, did you get any service betwe-n the 30th of March and the 29th of April?
A. Did I get any service?
Q. Yes, any telephone service?
A. No sir.
Q. Why were you paying for April when you had not gotten any service for April—paying on the last of April for services in April—why were you doing that?
A. I supposed they would put it in pretty soon.
Q. You supposed they would put it in pretty soon—it wouldn't be for April if April had past, would it?

By Mr. DANAHER: I object to that question.
By the COURT: I don't think it is applicable here whether she paid it or not.
By Mr. TERRY: I asked her why she paid it on the 29th of April when she knew it was impossible to get service for April after April had expired.
By the COURT: The court has ruled that is incompetent.
By Mr. TERRY: Exceptions saved.

Q. You did state you had not had any service up to that time for the month of April, 1908?
A. Yes, sir.
Q. When you paid the $2.75, did the man tell you he was going to give you service on the 30th of April or any other time in April?

By Mr. DANAHER: I object to any question about that.
By the COURT: You can ask about the conversation.

A. There was nothing said about it.
Q. Who did you pay this to?
A. I don't know.

207 Q. How did you get that notice or the bill Mrs. Danaher, was it mailed to you or did a young man bring it out to you?
A. He brought it to me.

Q. You are sure of that?
A. I am sure of that, I paid him at the door.
Q. It didn't come through the mails?
A. No, sir, it came by the collector.

Redirect examination:

By Mr. DANAHER: We want to offer these three receipts—for March, April and May, 1908, in evidence.

By the COURT: Read them to the jury and let the stenographer mark them.

By Mr. DANAHER: I suppose we can agree that her husband's name was M. J. Danaher—the bills are rendered in the name of M. J. Danaher.

By Mr. TERRY: Yes, sir.

Receipts offered as follows:

MARKED EXHIBIT "A" TO MRS. A. P. DANAHER'S TESTIMONY.

March Receipt.

No. 10. All Bills Payable in Advance.

LITTLE ROCK, ARK., *Jun-* 1, 1908.

Danaher, M. J., to The Southwestern Telegraph & Telephone Company, Dr.

Balance Due of Bills previously Rendered	$4
To Rental of Telephone Instrument and Exchange Service Months ending Mar. 31, 1908	2
By C.	6
Bal	2

Received Payment for the Company.

CHAS. VEDDER.

3-13-08.

EXHIBIT "B" TO MRS. A. P. DANAHER'S TESTIMONY.

208 *April Receipt.*

New Form 204.
Payable at Company's Office. Please send bill with remittance.

Telephone Building, 7th and Louisiana Sts., Little Rock.

Discount of 50 cts. allowed if paid on or before the 15th.
Office Hours, 8:30 A. M. to 5:30 P. M.

10.

Debits to Danaher, M. S.

2022 Izard.

Rental of Telephone and lines with Exchange service payable in advance as per contract, Apr.	$2.75
Toll charges for previous months as per detail below	....
Rental Bal. as per bill rendered	$4.00
Toll Bal, as per bill rendered	....
Total	6.75
Less Discount Net amount paid	2.75

Paid in cash $2.75.
Paid in Franks $—.

EXHIBIT "C" TO MRS. A. P. DANAHER'S TESTIMONY.

May Receipt.

Telephone Building, 7th and Louisiana Streets, Little Rock.

10.

Special Receipt.

Received from Danaher, M. J., Tel. No. 1950.

Credit on Account of May Bill amounting to $6.75	$....
On Rental $2.75; Toll $—	$....

Paid in cash $2.75.
Paid in Franks $—.

And further deponent sayeth not.
Plaintiff rests.

209 Whereupon the defendant company introduced the following testimony, to-wit:

Testimony of L. M. Loring.

L. M. LORING, being first duly sworn as a witness, testified on behalf of defendant as follow:

Direct examination.

By Mr. TERRY:

Q. What is your name?
A. L. M. Loring.
Q. What position did you hold with the Telephone Company in March, 1908, Mr. Loring?
A. I was local manager.
Q. At what place?
A. At Little Rock.
Q. Do you know anything about the claim of Mrs. Danaher that she was discriminated against in March and thereafter by the Telephone Company?
A. Well, I understand about this account that was in dispute.
Q. Did you look into it—do you know anything about that?
A. Yes, sir.
Q. Now, they are charging in their amended complaint for the months of April and May the Telephone Company charged her $2.75 rental and that we charged other people only $2.25 where they paid or offered to pay before the 15th, and that she offered to pay this then, but yet, notwithstanding, they rendered an account for April and rendered an account for May and made her pay $2.75, do you know anything about that?

210 A. Yes, sir.
Q. What was she charged, if anything, for the month of April?
A. Our books show a charge of $2.75, and then if there was a balance on that account and the bill was paid on or before the 15th of the month, there would be a discount of 50 cents allowed, making the net amount of the bill $2.25.
Q. Would the same thing occur in May?

A. Yes, sir, provided the bill was only for the month of May and no balance on it and it was paid on or before the 15th of the month.
Q. Now where parties are not getting telephone service, as Mrs. Danaher was in April and May——

By Mr. DANAHER: Are you testifying what the books show, or about an imaginary case?
WITNESS: I am testifying what the books show.

By Mr. TERRY: I understand these things have all been gone into and there would be no question about his testifying what the

books showed—we had the books here at the last trial and counsel went over them——

By the COURT: If he is testifying about the books, we will have the books here——

By Mr. DANAHER: I believe I can reach that fully by objecting to how the account stood at that time—it is not material to this case how the account stood, whether she owed an old balance or didn't owe it, they had no right to charge the 50 cents whether she owed the old balance or not—she said she didn't owe it——

By Mr. TERRY: The purpose of this—what I am driving at, we never charged her $2.75 or $2.25 for service while it was disconnected—it is just simply a statement of the book-keeper in
211 keeping a record of the phone—the telephone in her house, and it is the custom of the Telephone Company to carry out on their books while the telephone is in the house and then go back and credit on the books for the time the telephone is out of service, when the 'phone is taken out or service resumed——

By Mr. DANAHER: The point we make is—she might have owed a million dollars for something else, they didn't have a right to charge the 50 cents—that didn't make any difference——

By Mr. TERRY: The point I make is they didn't charge $2.75 for service, when the phone is taken out or service resumed——

By the COURT: The trouble is you are getting in a lot of testimony here that is incompetent——

By Mr. TERRY: I am trying to explain what is the object of this testimony——

By the COURT: No matter what your explanation is—the result is you are getting testimony before the jury that is incompetent——

By Mr. TERRY: The point I make is they didn't charge $2.75 for April?

By the COURT: Yes, you can show that.

By Mr. TERRY: And that we didn't charge $2.75 for May?

By the COURT: Yes, you can show that, but you have no right to go into this other matter—what was due——

By Mr. TERRY:

Q. Mr. Loring, do you know whether the phone was taken out of Mrs. Danaher's house in March 1908, or whether it was left in her house?

A. It was left in her house.

Q. Now when a party's telephone is connected and yet left in the house, what is your custom, or what custom does your company have with reference to keeping track of the telephone, or keeping the name on the books?

212 A. The name still appears on the books and there is a charge each month until the telephone is removed, and when the telephone is removed we make a credit back to the date it was not in order or should have been removed.

Q. When? To what time?

A. Back to the date the telephone is disconnected or should have been removed.

Q. Back to the date it was disconnected or should have been removed and service disconnected?

A. Yes, sir.

Q. Well this charge on your books, was that charged against her for the purpose of making her pay, and were you expecting to collect for the months she was not receiving any service, or was it for the purpose of keeping track of the telephone instrument—just your system of bookkeeping?

A. Just our system of bookkeeping we have up there.

Q. I show you this receipt for March, a total of $6.00 and a payment of $2.00, and I will ask you how that $2.00 is applied there on that receipt, is that a receipt for the March account or on account rendered, or how is it applied?

By Mr. DANAHER: I object, the receipt shows for itself.

By the COURT: Did you write that receipt?

WITNESS: No, sir.

By the COURT: The objection is sustained.

By Mr. TERRY: Exceptions saved.

——. ——.

By Mr. TERRY: I want to ask the same as to the April bill.

By the COURT: Did you write either one of these others?

WITNESS: No, sir.

213 By the COURT: Objection sustained as to these.

By Mr. TERRY:

Q. There is a receipt for May which is marked or printed "Special receipt," what is meant by a special receipt?

By Mr. DANAHER: We object to that.

By the COURT: He should have a right to show that.

By Mr. DANAHER: Not unless he could show the plaintiff knew what he meant by a special receipt.

By the COURT: He should have the right to show what that special is there. Go ahead.

A. A special receipt is a receipt that is given to a subscriber where he pays part on account and doesn't pay in full.

Q. Now these receipts here not marked "Special" or not printed "special," is there anything on these receipts to show that they are special receipts?

By the COURT: Those receipts will show for themselves what they are.

By Mr. TERRY: These don't.

By the COURT: The very fact they don't say special on them show that they were not special receipts——

By the WITNESS: We were not using the Special Form receipt at that time.

By Mr. TERRY: When did you start using the special form receipt?

A. About April or May, 1908.

Q. This is in April (referring to April Receipt)?
A. Yes, sir.
Q. And this one is in May 1908?
A. Yes, sir.

Q. This is on the 29th of April and this one is on the 2nd
214 of May, 1908?

A. Yes sir, I don't think we had these special receipts in stock at that time—we got them in the latter part of April or the first of May—don't think we had them in stock when the other receipts were made.

Q. Is there anything about that receipt there in March that shows it was intended for a special or for a general receipt?

A. This "by cash $2.00" would represent that it was a payment on account, or would be considered as a special receipt—it is not a payment in full.

Q. What about the April receipt?

A. (Reading) "Paid in cash $2.75" that would act the same as a special receipt—it shows that the payment was not for the entire amount.

By Mr. DANAHER: We move to exclude the testimony—these explanations of the receipts—the receipts show for themselves.

By the COURT: Did the plaintiff know these were special receipts at the time?

By Mr. TERRY: He didn't have any transaction himself—he didn't sign any of these receipts and didn't get in connection with them as I understand it——

By the COURT: Go ahead.

By Mr. TERRY: I am not sure we got in the record about the custom or charge of the full amount where the telephone is left in a party's residence and where service was discontinued, as to the charge on the books of the regular rental against that phone until such time when the telephone is returned to the Company or until such time when the difference is settled by the parties, and
215 then what the custom is in regard to crediting back to the subscriber the charge on the books in the interim there was no service, so when the transaction was cleared up, there really was no charge for the time when there was no service——

By the COURT: It wouldn't make any difference, that is immaterial.

By Mr. TERRY: Does the Court rule I cannot prove that?

By the COURT: Yes, you cannot go into that.

By Mr. TERRY: Exceptions saved.

Q. Do you know, Mr. Loring, in this particular case, whether on the 8th of May or at any other time in 1908, these charges that appeared on your books against Mrs. Danaher, were credited off because of the fact that she had no service from the 30th of March to the 8th of May, 1908?

By the COURT: That is a leading question.

By Mr. TERRY: I asked him if he knew it.

By the COURT: That is a leading question.

By Mr. TERRY: I save my exceptions to the court's refusal to allow me to ask the question.

Q. What do your books show with reference to these charges?

By Mr. DANAHER: We object.

By the COURT: He would have to have the books here on that point. He would have to show first he kept the books before he could testify what the books show.

By Mr. DANAHER: We object also to that for the further reason that any entries he made on his books wouldn't bind the plaintiff——

By Mr. TERRY: We seek to prove that the books show that where the party keeps the instrument in her possession, the custom of the Company is to carry a charge on its books against that instrument each month and continue until that matter is settled,

216 at which time the whole thing is charged off.

By the COURT: The objection is sustained, and the jury are instructed not to consider that statement in arriving at their conclusion in the case.

By Mr. TERRY: Exceptions saved to the ruling of the Court.

By Mr. TERRY: Now that was a general question, and I understand, the specific questions I want to ask on that point will not be allowed——

By the COURT: We will retire from the presence of the jury and consider what you want to prove——

(Here the Court and Parties retired from the presence of the jury, and the following proceedings were had).

217 By the COURT: I think this whole thing is inadmissible as to going into a custom that the plaintiff had no knowledge of—you don't claim that she was ever informed of it.

By Mr. TERRY: She has not said she had no knowledge of it.

By the COURT: I don't think that the issue in this case would admit that testimony at all. I may be wrong on that, but I don't think I am.

By Mr. TERRY: The defendant offers to prove by L. M. Loring, the manager of its Exchange in the City of Little Rock in March, April and May 1908, that the plaintiff was not charged $2.75 or or any other amount for telephone rental for the months of April and May 1908; that on the 30th of March, 1908, the defendant had sought to remove from the residence of the plaintiff its telephone instrument which the plaintiff had prevented, and that during the months of March, April and May the plaintiff retained possession of said telephone instrument; that defendant's custom and rule of bookkeeping in all cases where telephone instruments were not actually returned to its possession, was to continue on its books a charge against the said Telephone instrument and the former patron thereof, its regular monthly charges, for the purpose of keeping track of such instrument and finally adjusting any differences that might exist, and that its custom was when said telephone instrument was again put in use and service furnished over it, to credit to such subscriber against whom such debits had been made, an amount in

telephone rentals equaling the amount that would have been earned by the Telephone Company and due by the telephone user
218 for such time as intervened between the time that the telephone service was discontinued and the time when such telephone service was restored and all this was what they did with respect to plaintiff and her telephone.

By Mr. TERRY: Now we expect to prove the same state of facts by Mr. Chas. A. Vedder, the then bookkeeper of Defendant Company, and by George W. Hughes and Claude Jefferies.

By the COURT: You can prove that there were no charges made against her for the months of March, April and May—that you did not charge the $2.75 as alleged in the complaint, if you can, but you cannot go into the custom.

By Mr. TERRY: We save our exceptions to the ruling of the Court.

Here the Court and Parties returned and the following proceedings were had in the presence of the jury:

219 L. M. LORING re-called.

By Mr. TERRY:

Q. Do you know whether the Telephone Company demanded any money of Mrs. Danaher for the April rent on the 29th of April or at any other time, and at a time when she was receiving no telephone service?

A. The only money the Telephone Company would demand would be the amount which was due.

Q. What was that according to your contention and the contention of the Telephone Company?

A. According to our contention, the amount due up to the time the telephone was disconnected.

Q. Was that $4.00 or do you know?

A. Yes, I think it was $4.00.

Q. Would that also be true with reference to the May bill—would it or would it not?

A. Yes, under those circumstances it would be true.

Q. Now Mr. Loring, where a party had been given a written notice that his or her telephone would be disconnected on and after a given date if the bill was not paid, and where in pursuance of such notice such telephone was disconnected, what was your custom with reference to restoring the telephone connection?

A. The service couldn't be restored until the amount due was paid.

Q. What do you mean by amount due?

A. Amount due that caused us to send out the notice and to disconnect the phone for non-payment.

220 Q. You didn't actually come in contact with Mrs. Danaher in this matter—you didn't meet her yourself?

A. No, sir.

Cross-examination.

By Mr. DANAHER:

Q. Mr. Loring, when you testified a few moments ago in response to questions by Mr. Terry, that certain things would be done under certain conditions, you didn't mean to say by that that they were done in the case of Mrs. Danaher?

A. I don't understand what question you refer to.

Q. When you were explaining your system of bookkeeping with reference to charges made for the time the telephone was in the house but not in service, you say it is your custom and you explained that matter to Mr. Terry—were you telling what the general rule of your Company was, or were you telling what you did in the case of Mrs. Danaher?

A. I was telling what would be done in general—the rule applied to everyone as well as Mrs. Danaher.

Q. You are not attempting to tell the jury what was actually done in her case?

A. It would apply in her case if that was done in her case.

Q. You think it was?

A. Yes, sir.

Q. I will ask you to look at these three receipts that were doubtless sent out by your company—are they receipts issued by your Company?

A. Yes, sir.

Q. In each and every instance there for the month- of
221 March, April and May, there is a specific charge for telephone service for these months to Mrs. Danaher?

A. The receipts show the entire amount due at that time.

Q. And in each and every receipt it shows exactly that amount paid on this bill?

A. It shows the amount she paid on this in each case.

Q. The amount she paid is exactly the amount charged by your company on that bill for that month wasn't it?

A. Yes, but the payment was not applied on that month, it was applied on the account.

Q. You mean that is the way you applied it?

A. Yes, sir.

Q. You apply it regardless of any direction given you by the person paying it?

A. Yes, that is our custom.

Q. You don't pay attention, under your rules and regulations how the subscribers instruct you to apply it?

A. No, according to our rules and general custom we couldn't do it.

Q. You have a special rule you follow and you don't pay any attention at all to the wishes of the person paying the money in regard to the application—is that true?

A. When paying and they express their wishes that the amount paid be applied to a certain account. I tell them we can only accept the money on account, unless the bill is paid in full.

Q. You always refuse to apply it in any particular way?
A. Yes, sir.
Q. That is your system of crediting it?
A. Yes, sir.
222 Q. And you followed that rule in the case of Mrs. Danaher and refused to apply hers to the current month—did you?
A. Yes.
Q. In each and every instance?
A. Yes, sir.
Q. Now, Mr. Loring, you testified you did not demand or your Company did not demand from Mrs. Danaher, $2.75 for each of the months of April and May, 1908—how do you know you didn't?
A. Well the bill was mailed out to her or presented to her showing the balance due and the charge appearing on our books for the months of April and May, but our Company and our bookkeepers—they did not consider that a demand for the money for the months of April and May in cases like Mrs. Danaher's.
Q. That is part of your system in mailing a bill to the person, but that is not a demand for the money?
A. In this case it wouldn't be a demand for the money for the simple reason service was discontinued March 30th, I believe, and of course it wouldn't be considered a demand for the money.
Q. You didn't so consider it?
A. No, sir.
Q. Now Mr. Loring, when a man you are dealing with—a merchant—presents you a bill, do you consider it a demand for the money?
A. Yes, if I owe the bill it is a demand for the money.
Q. If you don't owe it, isn't it a demand anyhow?
A. Yes, it is a demand.

Redirect examination.

By Mr. TERRY:

Q. Do you know what became of this account and how
223 it was adjusted and when it was adjusted about the 8th of May or whenever it was?
A. You want the entire explanation?
Q. Yes, sir.
A. About May 8th it was called to my attention that Mrs. Danaher had made two payments of $2.75 each, one in the month of April and the other one in the month of May, which amounted to $5.50 in cash, the amount we were contending for on the old account—$4.00, would then be over-paid, and on account of it being called to my attention that she had made a payment that would more than pay this old account of $4.00, I then had a special representative to go out and call on Mrs. Danaher and to still further try and effect a settlement with her and come to some understanding and to see if she could find the receipts she claimed she had, but the man we sent out returned and said Mrs. Danaher said——

By the COURT: Don't tell what she said.

By Mr. TERRY: At any rate on his report, then what?

A. On his report the services was restored and allowance was made for the old account—$4.00—and also allowance made covering the discount for the months of April and May that she would have been entitled to.

Q. Fifty cents each month?

A. Fifty cents each month as in the case she had paid for the months of April and May.

Q. How did that leave the books then as against her?

A. It left a credit—a balance to her account.

Q. Left a credit there to her?

A. Yes, sir.

Q. Then what was done about restoring the service?

224 A. I issued an order that the telephone service be restored along about that date—May 8th, and it was restored.

Q. And as far as you know, it has been continued ever since?

A. Yes, sir.

Q. Do you know whether there has been, from that time to this—whether that has been credited to her account?

A. It was put on the books at that time.

Q. That was credited to her account about that time?

A. Yes, sir.

Q. Now you first stated where parties demanded that you accept payment for a given month, your rule at that time required such persons to pay all past indebtedness before applying the payment on the present month?

A. Yes, sir.

Q. That was in cases where you had extended credit to parties or given service on a credit?

By Mr. DANAHER: We object.

Q. In what kind of cases was that?

A. In any case where there was a balance on account.

Q. Where there was a balance on account—what was that?

A. That was for payment of back rental or back telephone service, where it had not been paid for.

Recross-examination.

By Mr. DANAHER:

Q. Mr. Loring, this telephone service was cut out and discontinued by you purely because you claimed Mrs. Danaher owed this old back bill of $4.00—Wasn't it?

A. That was it, yes, sir.

225 Q. You say there was an allowance of that $4.00 made on your books and also an allowance of some further amount—what was that other amount?

A. You mean the other amount—the amount of the allowance?

Q. Yes.

A. It was $1.00—50 cents on each of the two payments of $2.75.

Q. Was the allowance of $4.00 made too?

A. Yes, sir, the allowance of $4.00 was made also.
Q. You didn't allow her the whole $5.50 that she paid in these two months?
A. There was an allowance made also for the time her telephone was out of service.
Q. That is from March 30th to May 8th?
A. Yes, sir.
Q. When you say an allowance was made, what do you mean by that—did you pay her any money?
A. No, it is not a payment of money, but it is a credit to her account—you might call it a rebate or an allowance.
Q. You didn't give her back any money?
A. No, sir.
Q. Never gave it back since?
A. No, sir.
Q. She paid her telephone rental ever since?
A. I think so, I am so informed I am not positive of that.

Redirect examination.

By Mr. TERRY:

Q. Mr. Loring, isn't it a fact you have notified her repeatedly and she has been offered that credit on her monthly rental—when
226 the statements were rendered her and she declined to accept it?
A. I believe the credit appeared on statements which have been rendered to her and she has not accepted it—of course I am not positive she has been told every time about the credit.
Q. Are you positive she was told about it along the first few months and she declined to accept it during these first few months?
A. I don't know except what was told me by the parties.
Q. There are men that do know that—or at least claim to know?
A. Yes, sir.

And further deponent saith not.

227 *Testimony of Mrs. Adelia P. Danaher, Recalled.*

Mrs. ADELIA P. DANAHER re-called.

By Mr. TERRY:

Q. Mrs. Danaher, on the 30th of March, 1908, when the man came out to get the telephone instrument, were you at home?
A. Yes, sir.
Q. What occurred there at that time?
A. He just came for the telephone and I told him he couldn't have it.
Q. You testified in this case before didn't you?
A. Yes, sir.
Q. Didn't he bring a bill out there for the telephone balance?
A. No, sir.
Q. Didn't you testify here on the other trial that he brought the

bill and demanded either the bill—ask for the money or ask that you show the receipts, and as you claimed before, he asked you for the phone or the receipts one, and you told him he couldn't have either? You swore that yourself in the other Court room didn't you?

A. I don't remember.

Q. Do you remember whether he did demand them of you?

A. I said he couldn't get the phone.

Q. On page 13, you were asked this question: Q. "Do you remember that anyone called about that time and asked to see the receipts, when you told him you had them, and you promised to look them up, that you didn't have time right then to do it?" and you answered: A. "No, sir, I don't remember them asking me for receipts then." Q. "When do you remember them asking you for receipts?" A. "Just before they took the phone out; they sent a man there and he wanted the phone or the receipts one." Q. "That was in March, 1908?" A. "Yes, sir." "Q. Is that the first
228 time you knew anything about those receipts?" A. "Well, they might have asked me in the beginning. I told them I hade them and wasn't going to pay them over again."

By Mr. DANAHER: If the court please, I don't see the purpose of this—it seems to me it is entirely incompetent.

By Mr. TERRY (continuing):

Q. Now on page 22, a question by Mr. Danaher, "Q. Mr. Terry has asked you about some man coming out there and asking for receipts when was it that that happened?" "A. Just before they took the phone out." "Q. The same day?" A. "I think it was the same day." "Q. Was it the same man and at the same time that he came to take out the phone?" A. "Yes, sir." And then on re-cross examination——

By Mr. DANAHER: I object to -his testimony—it is fully in evidence why she refused to let them take the phone out——

By Mr. TERRY: I am asking if she said this.

Q. Now on re-cross examination that question was "Q. What did you say to that man when he asked you for the receipt?" A. "I told him he wouldn't get the receipt or the phone either one." Q. "You told him he wouldn't get the receipt or the phone either?" A. "No, sir, that I was paying for the phone and it was mine as long as I paid for it." Did you testify to that on the former trial?

By Mr. DANAHER: He first seeks to make an effort to contradict the other question—whether a man brought the bill out there and demanded the bill for the telephone—and now he is asking
229 if she ever testified this about the receipts. I say it is incompetent, because it is not the same thing at all, and it wouldn't matter whether the man brought the bill or demanded the receipts—it is wholly immaterial—the first question was, if he brought the bill and demanded the bill for the telephone——

By Mr. TERRY: We withdraw that about demanding the bill—what we want to know if she said this about the receipts——

By the COURT: Go ahead.

By Mr. TERRY:

Q. What is your answer—whether you testified this—that he couldn't get the receipts or the phone either?

A. I remember saying he couldn't get the telephone.

Q. Do you remember about the receipts?

A. No, I don't remember anything was said about the receipts.

Q. Is your memory any better now than it was at the time you testified before about a year or so ago?

A. I don't suppose it is.

Q. Probably not as clear?

A. No, I don't suppose it is.

And further deponent saith not.

230 *Testimony of Chas. A. Vedder.*

CHAS. A. VEDDER, being first duly sworn as a witness on behalf of defendant, testified as follows:

Direct examination.

By Mr. TERRY:

Q. What is your name?

A. Chas. A. Vedder.

Q. What position did you hold with the Telephone Company in March, April and May, 1908, Mr. Vedder?

A. In March, 1908, and in April, 1908, I was bookkeeper.

Q. At what place?

A. At Little Rock.

Q. Did you meet Mrs. Danaher in connection with her bill along about the 13th of March, 1908?

A. If I remember I met Mrs. Danaher in March, 1908—she came to the window to pay her bill.

Q. Was that Mrs. Danaher or Miss Danaher?

A. Mrs. Danaher.

Q. The young or the elderly lady?

A. The elderly lady.

Q. What happened or transpired between you and her at that time?

A. As I recall, she came to the window and said she wanted to pay her telephone bill—as a rule her bill is always presented by the collector, and of course her bill was not on file in the office, and I went to the ledger and looked at her account and found there was a $4.00 balance and $2.00 for the current month and made out the bill—$4.00 balance and $2.00 for the month of March, and I believe she told me she didn't want to pay that balance, that she had the receipts for that, and I gave her a receipt—"By cash on

account for $2.00" and marked on the account "Balance
231 $4.00."

Q. What did you do with that receipt?

A. I gave her the receipt.

Q. Is that the receipt (handing witness receipt)? Look at this receipt and see—it is the receipt marked Exhibit "A" to Mrs. A. P. Danaher's testimony—is that the receipt you refer to?

A. (Examining receipt.) Yes, sir, that is the receipt.

Q. What did you do then with reference to the account, if anything?

A. With reference to the account—the account had been running—I took charge as bookkeeper in September, 1907, and that balance of $4.00 had been running along each month, and $2.00 had been paid each month—after I talked to Mrs. Danaher, I gave the account to Mr. Jeffrey, Special Collector, gave it to him to investigate if necessary and to send notice——

Q. You did that on the 13th of March?

A. Yes, sir.

Q. Is Mr. Jeffrey in the Court room?

A. Yes, sir.

Q. Now did you have any other transaction with her or Miss Danaher, the daughter?

A. I did with Miss Danaher, the daughter—I remember she came there and paid her bill—I remember once or twice, I don't remember whether she came there more than that or not—the receipts would show.

Q. Were you there about April 4th, 5th, 6th, 7th and 8th when she came in and tendered some money?

A. I was there, I wasn't at the window—wasn't waiting on the window.

232 Q. Who was there?

A. I couldn't say.

By Mr. TERRY: Now we offer to prove the same things by this witness that we offered in the other room (in chambers).

By the COURT: Alright, I will make the same ruling.

By Mr. TERRY: We except and exceptions noted.

Q. Do you know what become of this account along about May 8th?

A. May 8th?

Q. Yes, sir, 1908.

A. On May 8th there was an allowance made on the ledger for the amount the telephone was disconnected—it was disconnected on March 30th and remained disconnected until May 8th, I believe, it was the date, on that date there was an allowance made for the time out of service, as I remember there was $4.00 balance, and the amount allowed was for the $4.00 also.

Q. Do you know why you made the allowance for $4.00—did you ever know?

A. I didn't make the allowance of $4.00.

Q. How did that leave the books stand with reference to you and Mrs. Danaher?

A. It left a credit balance to her favor.

Q. Do you know whether the credit balance was ever called to her attention or the daughter's attention after it was made?

A. I know it was called to the daughter's attention.

Q. How soon after it was made?

A. A month or two after it was made.

Q. It was made on the 8th after payment due for that month which was made on the 2nd or 4th of May?

233 A. Yes, sir.

Q. When was the next payment due, between the 1st and 15th of June?

A. You mean the next regular payment?

Q. Yes.

A. In June we rendered the people a statement—we don't get it out exactly on the first day of June every time.

Q. But you get it out so they can pay it and get the discount on it before the 15th of June?

A. Yes, sir.

Q. Do you know whether Miss Danaher was told this credit was there to her account?

A. I couldn't say for June.

Q. Did you ever hear anyone suggest or call her attention that there was a credit on the books?

A. I never heard anyone suggest, but I advised her myself when she came to the window to pay, that our record showed the amount to her credit, but she paid monthly and wanted to pay.

Q. In other words, she was paying in advance?

A. Yes, sir.

Q. What reply did she make to that if any?

A. She said she wanted to pay that amount and we gave her a receipt on account.

Q. Do you know what the books showed when you ceased to be bookkeeper as to credits in plaintiff's favor?

A. They showed a credit balance.

Q. In other words, did she ever take up that credit or use it?

A. Not to my knowledge.

Q. You are not now bookkeeper?

234 A. No, sir.

Q. You are now in Fort Smith?

A. Yes, sir, in Fort Smith.

Q. Manager at Fort Smith?

A. District Manager at Fort Smith.

Q. You don't know whether the credit was ever taken and used by her or left standing there?

A. No, sir.

Q. How did her account stand when you left there?

A. She was still paid ahead.

Q. When did you leave there?

A. I left there about the 15th of October, 1909—I went to Hot Springs then.

Q. Then it stood on your books for more than a year as paid ahead?

A. Yes, sir—paid ahead.

Q. You called Mrs. Danaher's or Miss Danaher's attention to it?

A. Miss Danaher—I called her attention to it.

Q. Once or more than once?

A. I don't remember, I called her attention twice to it I think, I think she was there—we had never mailed her bill—I don't think she ever had a bill.

Q. Did you mail them to her?

A. She came down and paid it. Usually, of course, the original is mailed and the duplicate is held in the office and the subscriber comes in to pay they usually bring the original, but there was no duplicate on file of her account and I had to make a special bill and give her credit so much on account.

235 Cross-examination.

By Mr. DANAHER:

Q. Mr. Vedder, all this work of making an allowance on that account or credits to Mrs. Danaher's account, all occurred after you got into this controversy with her, didn't it—after you had cut her phone out for forty days and it had been turned back on again?

A. Of course, after it was out of service.

Q. And also the allowance of $4.00 was made afterwards?

A. Yes, sir.

By Mr. TERRY: Made after when?

By Mr. DANAHER: Made after the telephone was disconnected.

By Mr. DANAHER: After it was connected again wasn't it—it would be after May 8th?

By Mr. TERRY: The credits were entered on May 8th and the phone was re-connected on May 8th.

Q. Had you had any law suit against the Company at that time?

A. Not on May 8th, no, sir.

Q. Had she threatened any law suit that you know of?

A. Not to my knowledge——

Q. There was no law suit then?

A. Not a thing.

Q. Who went out to see her about this?

A. Mr. Hughes.

Q. Mr. George Hughes?

236 A. Yes, sir.

Q. Did he say he knew the family?

A. He didn't report to me, he reported to the manager.

Q. You don't know why he went?

A. No, sir.

Redirect examination.

By Mr. TERRY:

Q. Was Mr. Hughes instructed, or some one in the office to go and get a release for all damages—to get a release from her——?
A. I couldn't say as to that.

And further deponent saith not.

237 *Testimony of Geo. W. Hughes.*

Mr. GEORGE W. HUGHES, being first duly sworn as a witness on behalf of defendant, testified as follows:

Direct examination.

By Mr. TERRY:

Q. You are in the employ of the Southwestern T. & T. Co. and were in March, 1908, were you not, Mr. Hughes?
A. Yes, sir, in the City of Little Rock.
Q. In what capacity?
A. Contracting and soliciting Agent.
Q. Did you have anything to do with the controversy with Mrs. Danaher about the 8th of May, 1908?
A. Yes, I remember a call from the Manager, Mr. Loring, to go out and call on Mrs. Danaher and see if there couldn't be some adjustment of the difficulty regarding her account, with instructions to adjust it as I saw fit, or recommend an adjustment.
Q. What difficulty was there on that account Mr. Loring meant at that time?
A. Well there seemed to be a balance hanging fire for two months' rental—the months of January and February, 1907.
Q. Beginning then?
A. Yes, sir, beginning at that time, and this having come to his notice, he took it up in the usual way and ordered the disconnection of service on account of non-payment, and after this account had been paid to such an extent as to fully cover the balance and it was again brought to his attention, then he told me to go out and investigate and see if we couldn't adjust it.

238 Q. Did you make any effort to find or to get any receipts or anything else of that kind from her?
A. I went out to see Mrs. Danaher and asked her if she had yet found these receipts, that we would like very much to have them or any other evidence she might have—that we would like to have them in order to straighten out the account, and she told me at that time she was yet unable to find them, but she contended she had them—had the receipts or had paid the amount and had the receipts somewhere, but couldn't find them, and I then, knowing Mrs. Danaher as I did—as I knew her and the whole family—I concluded, in the face of it all—thinking she might have been laboring under the impression she had paid her account and had

lost her receipts—that it was better to make an allowance to cover this account, and I offered to have her sign a voucher, which is our custom in making these allowances, because our Home Office in Dallas has to have our authority for so doing—having it O. K.'d and signed by the Manager——

Q. What did that voucher cover?

A. It covered the two months she was delinquent.

Q. What was the amount of it?

A. $4.00.

Q. What else did it cover?

A. That was all as far as I know—that was all I was asked to adjust.

Q. Do you know whether the difficulty or trouble between her and the Telephone Company exceeded that $4.00 then?

A. No, sir—nothing other than this existing delinquency.

Q. Now you wanted that voucher from her to give that to the bookkeeper as his authority for charging off the $4.00 that appeared against her?

A. Yes, sir.

239 Q. Which was forwarded to Dallas as his authority for it?

A. Yes, sir.

Q. To square his books with the home office?

A. Yes, sir.

Q. Did you get that voucher from her?

A. No, sir, Mrs. Danaher at that time refused to sign this voucher, said she would refer the matter to her sons.

Q. Who were her sons?

A. I presume Mr. Palmer Danaher and Mr. Walker——

Q. Where did he live—Mr. Palmer live at that time?

A. At that time he was living with her.

Q. In the City of Little Rock?

A. Yes, sir.

Q. Well, did you have any instructions or any intention of getting her to sign any release of damages or penalties or anything of that kind?

A. No, sir, nothing more than to adjust this $4.00—this delinquent account.

Q. Did you say anything about penalties or damages or anything of that kind?

A. None at all.

Q. You were simply trying to get the books straight—so you could forward the voucher to Dallas and get the books straight?

A. Yes, sir, in accordance with the instructions of the Manager.

Q. At the time she declined to sign the voucher, you said you knew them—had known the family for a good many years?

A. Yes, sir.

Q. You had lived here all your life?

A. Yes, sir.

240 Q. When she didn't give you that receipt for the $4.00 you went back and reported the fact to the office?

A. Yes, sir.

Q. First, Mr. Hug-es, let me understand better what that voucher is—what the purport is if she signed it?

A. Well the purport of it is no more or less than an allowance to cover this contention of delinquency.

Q. Why was it necessary for her to sign it—have you got some of the same kind in the office now?

A. Yes, sir.

Q. It wouldn't be very difficult to get them?

A. No, sir.

Q. Do you know what that voucher said?

A. Yes, sir. It is made out in this form—I don't remember the exact printed matter, but it is a blank—and when it is filled out reads—"Mrs. M. J. Danaher, Dr. to the Southwestern T. & T. Company, To adjust balances on account for the months of January and February, 1907," and it is to be signed by Mrs. Danaher to act in place of the receipt, to show that she accepted this allowance voucher as a credit on her account, and that we had taken up the matter with her and this credit had gone through her hands.

Q. You use these vouchers regularly?

A. Yes, sir.

Q. In case of controversy where you settle differences between you?

A. Yes, sir.

Q. If there is any question whether the account is paid or not and you desire to charge it off the books, you take this course to clean it off your books?

241 A. Yes, sir.

By Mr. TERRY: We offer to prove the same things by this witness that we offered in the other room—(In Chambers).

By the COURT: I will make the same ruling as before.

By Mr. TERRY: We except and exceptions noted.

Cross-examination.

By Mr. DANAHER:

Q. You understood before you went out, that this controversy about the $4.00 was for the months of January and February 1907?

A. I was told that.

Q. Well there was nothing to adjust about that except to give her credit for what she claimed? You couldn't have adjusted it any other way?

A. No, sir, but according to our system, we had to have some authority for it, and it was simply left to me whether I would give it to Mrs. Danaher—where she was entitled to this.

Q. She told you she was entitled to it?

A. She told me she had paid the account but couldn't find the receipts, and knowing her as I did—I had known her so long, was the reason for disposing of it that way, and going back to the office, I recommended rebate or refund covering this delinquency be made.

Q. That was done without this voucher wasn't it?

A. Yes, it was done through the Manager.

Q. You say you have regular forms that you use in all such cases?

242 A. Yes, sir.

Q. And have them now?

A. Yes, sir.

Q. The same kind of forms?

A. Yes, sir.

Q. Will you get one of them and produce it before this trial closes?

A. I can, yes, sir.

Q. Didn't Mrs. Danaher tell you if you wanted her to sign the voucher to leave it with her and she would refer it to her son, and if it was the proper thing for her to sign she would do so?

A. I don't recall that—my recollection of it was she would refer it to her son and he would come down and take care of the matter.

Q. She told me she was unschooled in business matters and wanted to refer it to him?

A. Not necessarily—not that I can recall—I took it from her action in the matter she didn't understand it and would like to refer it to him.

Q. You don't remember her asking you to leave the voucher with her and if it was proper she would sign it?

A. No, sir.

Q. Didn't you, upon being requested to leave that voucher with her there in order she might exhibit it to her son, tell her it was not made out in a very good shape and that you would make out another one and mail it to her or to him?

A. I don't recollect that.

Q. You won't say that didn't happen, will you?

243 A. No, I can't say that it didn't, I have no recollection of of it at all.

And further deponent saith not.

244 *Testimony of Claude Jefferies.*

CLAUDE JEFFERIES, being first duly sworn as a witness on behalf of defendant, testified as follows:

Direct examination.

By Mr. TERRY:

Q. What position did you hold with the Telephone Company in March, April and May, 1908, Mr. Jefferies?

A. Chief Collector.

Q. Were you with the Company in March, 1907?

A. Yes, sir, I began March 1st, 1907.

Q. Now you were collector in March, 1907, for the Telephone Company?

A. Yes, sir.

Q. And in 1908—March, April and May where were you?

A. I was Chief Collector and staid in the office.
Q. Now did any one pay a telephone bill there in March, 1908, that you have any knowledge of?
A. Yes, sir, one paid Mr. Vedder on March 13th, 1908.
Q. Who paid it?
A. Mrs. Danaher.
Q. How do you know it was Mrs. Danaher?
A. It was the elderly lady that sits over there—I noticed her out there in the lobby at the time.
Q. Did you know her before that?
A. I knew her, I was not personally acquainted with her—just from seeing her at different times.
Q. Had you been out to her house before that?
A. Yes, sir, once before.
245 Q. She is the lady that paid there in March, 1908?
A. Yes, sir.
Q. Do you know what occurred at the time she paid?
A. No, sir, I didn't hear any conversation at the time.
Q. You were not at the window at that time?
A. No, sir—I was standing back from the window 10 feet or something like that.
Q. On April—sometime about the 5th to the 7th Miss Lula Babb Danaher, came down to the office and paid the telephone bill, did you meet her at the window or did you see her?
A. No, sir.
Q. Who was it she talked to?
A. We had two at the window at that time, Mr. Branch and Mr. Hubbard.
Q. On May 2nd she came down and paid the telephone rent, did you see her at that time?
A. No, sir.
Q. Do you know anything about the April and May accounts?
A. No, sir.
Q. You didn't have anything to do with them?
A. No, sir.
Q. Now when Mrs. Danaher was in there on March 13th, 1908, when she paid this $2.00 and said she didn't owe the old balance of $4.00, did you have anything further to do with her account?
A. The account was referred to me together with other account balances.
Q. Who referred it to you?
A. Mr. Vedder.
Q. Along with other accounts showing balances?
246 A. Yes, sir, that was the custom with all, accounts that showed a balance, to refer them to me.
Q. What did you do at that time when the account was referred to you?
A. Made out a ten day notice—a regular form—and mailed it to her.
Q. You mean a delinquent rental notice?
A. Yes, sir.

Q. At what point did you mail it?

A. To her address—her residence—2022 Izard.

Q. Now later on when that time expired, did you have anything further to do with it?

A. On March 23rd, when the notice expired, together with several other notices that expired on the same day we called up all the subscribers we had sent notices to and told them unless the bill was paid that day the service would be discontinued.

Q. What you did in her case was the same as in the other cases?

A. Yes, sir.

Q. Why was her service not discontinued the same as the others?

A. On account of her claiming she had paid the bill, and we endeavored to get the receipts.

Q. On the 23rd, what did she claim?

A. I don't remember.

Q. Why was it not cut out on that day—why was seven days more given her?

A. We were trying to have some one see her and get the receipts?

Q. Did you mail out more than one notice on the 13th of March to people in arrears?

247 A. We mailed out several, yes, sir.

Q. What was the custom at that time with reference to mailing notices?

A. It is a rule to mail notices to everyone for every month's rental.

Q. What about the ten days' notice, and taking out the phone—what is the custom?

A. On ten days' notice—that was our custom—to give them ten days' notice.

Q. Did you pursue any different course in her cause than in any other cases?

A. No, sir, in fact we put them all in one bunch, and the day they expired we called them all up together.

Q. You speak of the 13th of March, did that always happen on the 13th or did it happen any day in the month?

A. That happened any day in the month—from before the 15th to sometime after the 15th, but not later than the 20th anyway.

Q. Along between the 10th and 20th of each month?

A. Yes, sir.

Q. That is liable to happen every day between the 10th and 20th of the month—then and now?

A. Yes, sir.

By Mr. TERRY: We offer to prove the same things by this witness that we offered to prove in the other room (In Chambers).

By the COURT: The same ruling as made before.

By Mr. TERRY: We except and exceptions noted.

248 Cross-examination.

By Mr. DANAHER:

Q. Mr. Jefferies, you were not at the window on March 13th, when you say Mrs. Danaher came there?

A. I was not waiting on her.
Q. You didn't hear any conversation that took place there at all?
A. If I remember right, I was standing about ten feet away from the window, waiting to ask Mr. Vedder some questions, and I noticed Mrs. Danaher out there.
Q. How do you know that was March?
A. The only thing I go by is the notice I mailed that day—I mailed the notice to her that day.
Q. What makes you think Mrs. Danaher was there that day?
A. Because when Mr. Vedder got through talking to Mrs. Danaher he turned around and handed me the account at the time.
Q. Wasn't Miss Lula Babb Danaher there also?
A. If she was I didn't see her, probably she was in the lobby or out to the buggy, I didn't see her.
Q. Wasn't it in the lobby you saw Mrs. Danaher?
A. Yes, sir, near the window.
Q. Although you were standing there waiting to talk to Mr. Vedder, you didn't hear any conversation take place?
A. No, sir, I was out a distance, and in fact wasn't listening to any conversation.
Q. You paid no special attention to see that Mrs. Danaher was there?
A. Nothing more than I looked out through the window and saw Mrs. Danaher was standing there, and after she left Mr.
249 Vedder referred the accounts to me, and it was the same woman I had presented bills to.
Q. Hadn't she and her daughter been at your office paying bills?
A. That was the first time I knew of her paying a bill at the office.
Q. She has been paying them time and again there since then?
A. Yes, sir.
Q. Do you remember every body that comes to the office?
A. No, sir, only when something special calls my attention to it.
Q. What time a day was it she was there?
A. I don't remember, I believe it was just before noon—I don't remember what time it was.
Q. Did you see any one with her?
A. I never noticed it.

And further deponent saith not.

250 *Testimony of Ernest Sowell.*

ERNEST SOWELL, being first duly sworn as a witness on part of defendant, testified as follows:

Direct examination.

By Mr. TERRY:

Q. Mr. Sowell, what position did you hold with the Telephone Company in March, April and May, 1908?
A. 1908?

Q. Yes, sir.
A. I wasn't there at all.
Q. Were you there in 1907?
A. I was in 1907, yes, sir.
Q. What position did you hold with them in 1907?
A. I was collecting.
Q. Were you ever bookkeeper or assistant bookkeeper?
A. I was bookkeeper along about I believe I came there about the 1st of May, 1908, I said there I wasn't there in April—I came the latter part of April—I came back to the office.
Q. Did you have anything to do with parties paying their bill at the office?
A. No, sir.
Q. You didn't come in contact with them?
A. No, sir, I don't see them.
Q. When were you collector in 1907?
A. I began in January—the latter part of January and was there until about the middle of August, 1907.

(No questions on cross-examination.)

251 By Mr. TERRY: We offer the following testimony that was given by this witness on the former trial: "That prior to being a bookkeeper he was collector for the Telephone Company and called on Mrs. Danaher several times during the year 1907 from month to month with bills showing the balance of $4.00 and the charge of $2.00 for the current month; that she claimed to have paid the balance of $4.00 and more than once promised to produce the receipt or receipts; that he collected from her at her residence and that she said to him she didn't then have time to look up the receipts. That in July, 1907, he had a bill against her showing a balance of $6.00 and a charge of $2.00 for the current month of July; that she had failed to pay her June bill, and in July she paid him $4.00, which he credited on her account, leaving a balance of $4.00 due. That he knew Mrs. Danaher and that he dealt with her personally, and that the books showed she made this $4.00 payment on the 15th of July, 1907, which corresponds with his pocket memorandum collections made. On the 15th of July, 1907, was one of the times Mrs. Danaher claimed to have the receipts and promised to get them when she got time; that the books showed a balance of $4.00 for January and February, 1908, and a charge of $2.00 for the current month of March, with a credit of $2.00 paid on account March 13th, 1908, with a balance of $4.00 carried forward to the April account. The books showed she paid $2.75 in April and $2.75 in May. And the books showed that on the 8th of May the Telephone Company charged off to P. & L. the $4.00 balance, and credited Mrs. Danaher the time she had been out of telephone service, leaving a credit to her account on May 8th of $4.45, which credit remained to her account on the books of the Company
252 to the present date."

By the COURT: I will make the same rulings as I did to the other testimony that was offered in Chambers.

By Mr. TERRY: We except and exceptions noted.

And further deponent saith not.

253 *Testimony of C. Hammond.*

C. HAMMOND, being first duly sworn and examined as a witness on the part of defendant, testified as follows:

Direct examination.

By Mr. TERRY:

Q. Where were you working, Mr. Hammond, in 1908?
A. In 1908?
A. Yes.
A. I was with the Telephone Company about a month—in January of that year, and I worked for them the latter part of 1907.
Q. In what capacity?
A. Bookkeeper.
Q. Have you been with them since then?
A. No, sir.
Q. Where are you working?
A. For the Missouri State Life Insurance Company.

By Mr. TERRY: We offer the following testimony that was given by this witness on the former trial: "That in January and February, 1907, plaintiff failed to pay her telephone rental amounting to $4.00, and that the books showed payments on account and balances carried forward from month to month from March 30th, 1907, down to March 30th, 1908, and that he kept the books from August, 1907, to February, 1908, and that Mr. Vedder was his assistant bookkeeper; that the books were correctly kept and showed no alterations nor erasures, and that the amounts paid were always credited on the back months and the balances brought up and charged against the two months next preceding the current
254 month, the balance of $4.00 always showing in red ink."

By the COURT: The same ruling will be made as to the other testimony offered in chambers.

By Mr. TERRY: We except and exceptions noted.

And further deponent saith not.

255 *Testimony of Miss Lula Babb Danaher, Recalled.*

Miss LULA BABB DANAHER, re-called.

By Mr. TERRY:

Q. Miss Danaher, when you wen- to pay your bill along in May, June and July, 1908, you were told about this credit—you were paying in advance?
A. I was.

Q. They told you that you didn't need to pay it or something to that effect?
A. Yes, I was in June.
Q. And in July?
A. Yes, sir.
Q. How many months did they tell you that—did that continue?
A. I don't exactly remember, they told me several times.
Q. Why didn't you take advantage of it?
A. Well because we had the telephone in the house and we always paid the month in advance and we paid for the telephone each month in advance.
Q. You never would take advantage of this credit?
A. No, because we paid the month in advance.
Q. Well if you had already paid in advance you wouldn't *had* had to pay in advance?
A. I didn't consider we had paid it.

Cross-examination.

By Mr. DANAHER:

Q. You thought each time they told you about this they were trying to get some advantage of you in this law suit?
A. Yes, sir—I didn't know what they were trying to do.
256 Q. You had been instructed by your attorneys to pay them every month?
A. Yes, sir.
Q. And you were complying with their advice?
A. Yes, sir.

Redirect examination.

By Mr. TERRY:

Q. Who were your attorneys?
A. My brother and Mr. Williams.
Q. So you would go down each month under instructions of your attorneys?
A. Yes, sir.
Q. And you thought the Telephone Company was trying to get advantage of you in this law suit?
A. Yes, sir.
Q. They began telling you that in June or May?
A. It was in June.
Q. You said May before, didn't you?
A. I don't remember it.
Q. On page 34 of your former examination—at the former trial, this question was asked you: "Q. Then the Company didn't claim they were owing you in April, 1908, did they?" A. "Not in April, in May." "Q. After Mr. Hughes had been out to see your mother?" A. "No, sir, it was the 1st of May." "Q. You are sure of that?" A. "Yes, sir." "Q. Did you pay it on the 1st of May?" A. "1st or 2nd." Q. "Which was it?" A. "It was about the 1st." "Q. On

257 or about the 1st of May somebody at the office told you the company was indebted to you?" A. "Yes, sir." "Q. Do you remember when Mr. Hughes called to see your mother about the 8th of May?" A. "Yes, sir." "Q. Was it prior to that time they told you they were owing you?" A. "Yes, sir." "Q. You are sure of that?" A. "Yes, sir." "Q. How do you remember that so distinctly that it was prior to the 8th of May they told you they were owing you?" A. "Because I always go to the first of the month and pay the bills; the first of April and May I went." "Q. Wasn't it subsequent to that and in the month of June when they told you that?" A. "No, sir." Q. "How do you know it was in May, you know it was the first of the month because that was when you paid your bills?" A. "I just remember it." Q. "You remember what day in June, 1908, you went to the office? Do you remember what you did?" A. "They said the same thing." "Q. What did they say in July?" A. "For several months they said the same thing." "Q. You distinctly remember that they began saying this on the occasion of your visit in May, 1908?" A. "Yes, sir." "Q. It wasn't later than the 2nd of May, 1908?" A. "No, sir."—Now did you testify to that on the former trial, Miss Danaher?

A. I think I did.

Q. These questions and answers I read to you?

A. I think I did.

Q. Your brothers have a copy of this original transcript and record of that, have they not?

A. Yes, sir.

Recross-examination.

By Mr. DANAHER:

258 Q. What is your best memory now, irrespective of what you said last trial, when they first told you they had given you credit on the books?

A. As I remember it was in June.

Q. You don't think now it was before the telephone was put back in?

A. No, sir.

Q. You think that was a mistake in your previous testimony?

A. Yes, sir.

Redirect examination.

By Mr. TERRY:

Q. Miss Lula, I show you a receipt that is a copy, dated June 4th, 1908, the bill show-, Rental $2.75, and discount 50 cents, net amount you paid, by cash $2.25. Where did you get that bill?

A. At the office.

Q. You went down and paid it?

A. Yes, sir.

Q. Did they mail that bill the first of June or did you go after it?

A. I think I went after it.
Q. You remember paying that on the 4th of June do you?
A. Yes, sir.
Q. 1908?
A. Yes, sir.
Q. Now you say you declined to take this because you had been told the Telephone Company was trying to get some advantage of you in this law suit?
A. I didn't understand you.

Q. You stated awhile ago in answer to a question why you
259 didn't accept this rebate that you were afraid the Telephone Company would get some advantage of you in this law suit?

A. Yes, sir.
Q. Had you brought this suit on the 4th of June, 1908?
A. I don't remember when it was brought.
Q. You don't remember the date?
A. No, sir.

By Mr. DANAHER: It was filed on the 30th of May, 1908.
And further deponent saith not.
Defendant close-.
Plaintiff close-.
Which was all of the testimony offered upon the trial of this cause.

260 *Instructions Requested by Plaintiff.*

And Thereupon the plaintiff requested that the Court instruct the jury as follows:

No. 1.

If you believe from the evidence that, at the time of paying the amounts shown to have been paid by the plaintiff to defendant in the month of March, 1908, the plaintiff refused to pay a balance shown thereon of $4.00, alleged by defendant to have been due for the months of January and February, 1908, basing her refusal upon the ground that she had paid all charges due for January and February, 1908, but acknowledging the correctness of the charges for the month of March, and paid to the defendant's collector the sum acknowledged to be due for March, this was a complete application of the payment to the satisfaction of the charge for the month of March, and the defendant, upon accepting the payment, was bound to apply it accordingly; and the same rule applies to all payments made for the months subsequent to March, 1908.

The Court on motion of the plaintiff gave Instruction No. 1 asked by plaintiff, to which action of the Court, defendant at the time excepted and asked that its exceptions be duly noted of record, which is accordingly done.

No. 2.

If you find from the evidence that the plaintiff paid to the defendant its regular rental charges for telephone service at her residence

for the months of March, April and May, 1908, and that the defendant cut off the plaintiff's telephone connection on the 30th
261 day of March, 1908, and thereafter refused to permit the plaintiff to use her telephone or to furnish her telephone service until the 8th day of May, 1908; and if you further find from the evidence that during said period of time while the plaintiff's telephone was so cut off by the defendant, the defendant was furnishing telephone service to other residents of the city of Little Rock who paid for service like that demanded and paid for by plaintiff, the same charges as were paid by the plaintiff, then your verdict will be for the plaintiff.

The Court gave Instruction No. 2, so requested by plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 3.

Under the law, the defendant should not refuse to serve the plaintiff because she had not paid a debt contracted for services rendered in the past, and if you find that defendant did refuse to render her services for that reason, your verdict should be for the plaintiff.

The Court gave Instruction No. 3, so requested by plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 4.

If you find from the evidence that it was the rule of the defendant company to charge its patrons in the city of Little Rock $2.75 for residence telephones during the month of May, 1908, and to allow them a discount of fifty cents off of that amount if payment
262 was made before the 15th of the month; and if you further find from the evidence that before the 15th day of said month the plaintiff tendered to the defendant the sum of $2.25 in payment for the telephone service at her residence for the month of May, 1908, and that defendant refused to accept said amount, but demanded and required the plaintiff to pay the sum of $2.75, then you will find for the plaintiff in the sum of one hundred dollars for each day of the month of May, 1908.

The Court gave instruction No. 4, so requested by the Plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 5.

If you believe from the evidence that the plaintiff, through her daughter, Lula Babb Danaher, tendered to the defendant $2.25 for telephone rental for the month of April, 1908, on or before the 15th of April, 1908, and that defendant refused to receive same and give her telephone service for that month, then plaintiff is entitled to recover the statutory penalty of $100.00 per day for said month

of April. Provided, however, that no more than one penalty can be allowed for any one day.

The Court gave instruction No. 5, so requested by plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 6.

If you find for the plaintiff, your verdict will be for the sum of one hundred dollars per day for each day or part of a day that the defendant refused to furnish telephone service to the plaintiff,
263 while service was being furnished to other persons, that being the penalty provided by law in such cases. And in computing the time for which you will allow such penalty, you shall include every day or part of day during which such service was refused.

The Court gave Instruction No. 6, so requested by plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 7.

As to all facts alleged in the compliant and denied in the answer, the burden is on the plaintiff to prove same by a preponderance of the evidence. All facts alleged in the complaint and not denied in the answer are to be taken as true without proof.

The Court gave Instruction No. 7, so requested by Plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 8.

Even if you should believe from the evidence that at the time of making the various payments shown to have been made by plaintiff for the months of March, April and May, 1908, she was contemplating the bringing of this suit, this fact is no defense to this action.

The Court gave Instruction No. 8, so requested by plaintiff, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

264 The Court thereupon instructed the jury upon its own motion as follows:

You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. You may take into consideration their interest, bias or prejudice, if any, the probability or improbability of the story related by them, their relationship to the parties and to the case, if any, and any and all facts and circumstances in evidence which in your judgment would add to or detract from their credibility or weight of their testimony.

(Given without objection.)

The defendant thereupon asked the Court to instruct the jury as follows:

265 "A."

You are directed, in case you find for the plaintiff, to say specially in your verdict what days or time you find plaintiff was discriminated against.

(Given.)

"B."

You are directed, in case you find for the plaintiff, to say specially in your verdict what act or acts the defendant committed that constituted discrimination against the plaintiff.

(Given.)

Instructions Requested by Defendant.

No. 1.

The Court instructs the jury that under the law and the evidence your verdict will be for the defendant.

The Court refused to give instruction No. 1, so requested by defendant, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 2.

The Court instructs the jury that if you find from the evidence that the defendant enforced against plaintiff the same rule or regulation that it enforced against all others in like situation with the plaintiff, your verdict will be for the defendant.

The Court refused to give Instruction No. 2, so requested by defendant, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

266 No. 3.

The Court instructs the jury that the complaint in this case is based on a statute prohibiting discriminations or partialities, and providing that no telephone company shall impose any condition or restriction upon any applicant for telephone connections or facilities that are not imposed impartially upon all persons in like situation—under this law before you can find for the plaintiff, you must find that the defendant discriminated against her by imposing conditions or restrictions upon her that were not imposed impartially upon all others in like situation with her.

The court refused to give instruction No. 3, so requested by defendant, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 4.

The Court instructs the jury that the law permits a telephone company to adopt and enforce reasonable rules and regulations. That the law does not define what are reasonable rules and regulations, and that a telephone company cannot under the statute sued on (or) tell in advance of a decision what is or what is not a reasonable rule or regulation.

Therefore if you find that the defendant enforced against plaintiff a rule or regulation and that it acted in good faith in this, believing it had the right under the law to do so, and that it generally and impartially enforced this rule or regulation against all persons in like situation with the plaintiff, your verdict will be for the defendant.

The court refused to give instruction No. 4, so requested by defendant, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

267 No. 5.

The Court charges the jury that the statute sued on is void for that it is too uncertain and indefinite in the matters and things prohibited.

The Court refused to give instruction No. 5 so requested by defendant, to which action of the Court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 6.

The Court charges the jury that the statute sued on is void for that its penalties are pronounced only against corporations engaged in the general telephone business and are not pronounced against persons or individuals engaged in a like business.

The court refused to give instruction No. 6, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 7.

The Court instructs the jury that a telephone Company has the right to refuse telephone service to those who neglect or refuse to pay therefor; and that it has the right to refuse to continue to furnish such service to those who are due it money for such service for the past months and who neglect or refuse to pay for such past services after due notice and demand; and that even should you find that the plaintiff was not in fact indebted to the defendant for such telephone service, still if defendant believed she was so indebted to it, and notified her thereof and she failed or refused to pay therefor, and that thereafter defendant disconnected her telephone and refused to give her further service because it believed she was indebted
268 to it, she cannot recover in this action. And this is so even if the Agents of the defendant were negligent in not knowing that she was not so indebted to it.

The court refused to give instruction No. 7 so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 8.

The Court instructs the jury that if you should find the defendant's rule requiring the payment of past months' bills as a condition for furnishing future telephone service, is unreasonable, still the plaintiff cannot recover in this case if the defendant enforced the same rule against all others in like situation with the plaintiff.

The court refused to give instruction No. 8, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 9.

The court instructs the jury that whether defendant's rule of disconnecting telephones and refusing service to those whom it believed were in arrears with it for telephone rentals for the past two months, was reasonable or unreasonable is immaterial in this case, provided the defendant enforced said rule against all persons in like situation with the plaintiff.

The Court refused to give instruction No. 9, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

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No. 10.

The court instructs the jury that the penal statute relied on by plaintiff in this suit applies only to cases where the defendant wilfully refused to furnish telephone connections, services and facilities, knowing that the plaintiff had paid her past telephone rental charges.

The court refused to give instruction No. 10, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 11.

The court instructs the jury that if you find from the evidence that plaintiff believed she had paid all past due telephone rentals and under this belief tendered to the defendant the telephone rentals for the current months of April and May, 1908, the defendant had the right, if it believed she was indebted to it for the two prior months' rental, to decline to accept the money so tendered for said current months, and to apply such sum as she may have paid on her account, and in so far as this penal action is concerned, had the right to decline to furnish her telephone connections, service and facilities until such past telephone rentals were paid, and until she paid or tendered payment for future service, or at least until she

would satisfy the defendant that the same had been paid or were not due.

The court refused to give instruction No. 11, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

270 No. 12.

The court instructs the jury that the burden of proof is upon the plaintiff to show by competent evidence that the plaintiff was not indebted to the defendant at the time her telephone was disconnected, and that the defendant wilfully refused to furnish her telephone connections and facilities, knowing that she was not indebted to it.

The court refused to give instruction No. 12, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 13.

The court instructs the jury that if you find that defendant's books are not accurate or correct, still plaintiff cannot recover in this action unless you further find that defendant knew its books were as to plaintiff inaccurate and not correct and that plaintiff was not indebted to it.

The court refused to give instruction No. 13 so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 14.

Although you find the plaintiff was not indebted to the defendant, yet if you find that, by reason of the negligent or careless manner in which the defendant's books were kept or the accidental neligence or careless failure of defendant's agents or bookkeepers to credit plaintiff with all amounts paid by her, defendant's manager in charge of its exchange at Little Rock, believed or supposed defendant's books showed that plaintiff had not paid all telephone rentals due
271 by her to it, and for the reason that he so believed or supposed, disconnected her telephone from defendant's exchange or discriminated her telephone service plaintiff cannot recover herein and your verdict will be for the defendant.

The court refused to give instruction No. 14 so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 15.

Although you may find that plaintiff paid all her telephone bills, as alleged in her complaint, yet if the evidence does not show that the collector collecting same reported all such collections to the agents or employees of the defendant, having charge of the entry

of such collections on the books of such company, or the keeping of some other records of the same, whether such failure to so report was due to accident or to the negligent or wilful conduct of such collector, then your verdict will be for the defendant, unless the evidence shows that defendant's manager, agents or officers, having charge of its exchange at Little Rock, or some one of them actually knew that the same had been paid at the time plaintiff's telephone service was discontinued.

The court refused to give instruction No. 15 so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 16.

You are instructed that if you find from the evidence that before the time plaintiff's telephone service was discontinued by the defendant, defendant's employees or agents notified plaintiff
272 that she was indebted to it for two months' telephone rentals, and that a dispute existed between plaintiff and defendant, as to whether or not plaintiff was so indebted to the defendant, and plaintiff had receipts of the defendant showing that she had paid all such telephone rentals and was not so indebted to the defendant, and defendant's employees requested plaintiff to show such receipts to them and gave her a reasonable opportunity to do so, and plaintiff failed or refused to show such receipts to such employees, and the employees of the defendant were thereby influenced to believe that plaintiff was mistaken in her claim that she had paid such telephone rentals, then you are instructed that plaintiff having so contributed to the production of such opinion in the minds of defendant's employees, is precluded from the right to recover herein, and your verdict will be for the defendant.

The court refused to give instruction No. 16 so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

No. 17.

The court instructs the jury that in no event can the plaintiff recover any penalties for the days in April and May, 1908, that preceded her payment or tender of payment for the months of April and May, 1908.

The court refused to give instruction No. 17, so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

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No. 18.

You are instructed that if plaintiff was treated by the defendant in all matters relating to the controversy between plaintiff and defendant the same as or as well as it treated its other customers generally the defendant was not guilty of any discrimination against plaintiff and if you so find you will return your verdict for the defendant.

The court refused to give instruction No. 18 so requested by defendant, to which action of the court defendant at the time excepted and asked that its exceptions be duly noted of record which is accordingly done.

These were all the Instructions requested, given and refused in the Case.

These were all the Instructions in the Case.

274 *Verdict.*

After argument of counsel, the jury retired to consider of its verdict, and after awhile returned into court the following verdict:

"We the jury find a verdict in favor of the plaintiff as follows:
From March 30th to May 8th, 1909, inclusive, making forty days at $100.00—(One Hundred Dollars) per day for non service, making $4,000.00—Four thousand Dollars, and
From May 9th to May 31st, 1908, inclusive, 23 days at $100.00—One Hundred Dollars per day, making $2,300.00 (Twenty-three Hundred) Dollars for discrimination.
Making a total verdict of ($6,300.00) Sixty three Hundred Dollars in favor of the plaintiff.

A. B. BEELER,
Foreman."

In due time the defendant filed its motion for new trial which was in words and figures as follows, to-wit:

275 Pulaski Circuit Court, Second Division.

ADELIA P. DANAHER, Plaintiff,
vs.
THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY,
Defendant.

Motion for New Trial.

Comes the defendant herein, by its attorney W. J. Terry, and prays the Court to set aside the verdict of the jury herein and grant it a new trial and for cause says:

1st. The court erred in refusing to allow defendant on cross-examination to show the interest of witness, Miss Lula Babb Danaher, in attempting to call Central Office every day, after service of plaintiff's telephone had been discontinued,

2nd. The court erred in refusing to allow the defendant to prove by witness Miss Lula Babb Danaher on cross-examination, the past indebtedness of plaintiff from July, 1907.

3rd. The court erred in refusing to allow the defendant to prove by witness, Miss Lula Babb Danaher, on cross-examination, that she

was at home when the bill was presented to her mother (plaintiff) on March 30th, 1907, showing a balance; and also in refusing to allow defendant to prove by said witness anything that transpired during the year 1907.

4th. The court erred in refusing to allow defendant to prove that on March 13th, 1908 the plaintiff was indebted to defendant for telephone rentals for the month of January, February and March, 1908.

276 5th. The court erred in refusing to allow defendant to prove that its contract with its various subscribers and its contract with the plaintiff, stipulated for payment of telephone rentals monthly in advance, but that a large per cent of said subscribers were in the habit of paying in arrears, and that that had been the custom and rule in the City of Little Rock, Arkansas, for many years prior to March, 1908.

6th. The court erred in refusing to allow defendant to prove that for many years prior to March, 1908, the defendant had established and enforced rules and regulations whereby all patrons who were in arrears to it for telephone rentals should be notified in writing of such fact, and also by like notice advising if said rentals were not paid on date named in such written notice, that defendant would decline to serve such subscribers until such delinquent subscribers had paid said rentals so in arrears, and that defendant uniformly declined to serve such delinquent subscribers in the future unless the past due rental was paid.

7th. The court erred in refusing to allow defendant to prove that it was the rule and regulation of the defendant where it had disconnected a subscriber's telephone for non-payment of past rentals, to refuse such subscriber future telephone service except on condition that such delinquent subscriber should pay such past due indebtedness.

8th. The court erred in refusing to allow defendant to prove that on the 13th of March, 1908, the plaintiff was — arrears, and defendant's books showed that she was in arrears, for the months of January and February, 1908, and that she was also owing $2.00

277 for March, 1908, and that on that day she paid $2.00, at which time she denied she was owing the past due indebtedness; and thereupon the defendant receipted her for $2.00 as a credit on account of her bill of $6.00, and that plaintiff claimed that she had receipts showing she was not indebted to defendant for any month prior to March, 1908, and represented and promised to produce said receipts; that this claim on the part of the defendant for past indebtedness of $4.00 for two months' telephone rental had begun in March, 1907, and extended down to March, 1908, during which time the defendant had often called on the plaintiff, presenting its bills showing such past indebtedness and asking the plaintiff to produce said receipts. That plaintiff had frequently promised to produce said receipts or evidence showing she was not so indebted but that plaintiff failed to do this. That this extended down to the 13th of March, 1908, on which date the defendant again notified plaintiff of such past indebtedness, and on which date it mailed to

the plaintiff its usual written notice, advising her of such indebtedness and that if same was not paid on or before the 23rd of March, 1908, her said telephone service would be discontinued, which notice was received by the plaintiff, and that on the 23rd of March, 1908, the date of the expiration of said written notice, in pursuance of its usual custom, the defendant called the plaintiff by telephone and again notified her that her telephone rental was past due and unpaid, and that if the same was not paid her telephone service would be discontinued until the same was paid; that thereupon the plaintiff again claimed she had paid said bills and promised to produce said receipts, for which reason the defendant extended the time when it would disconnect her service and refuse her future service, from the 23rd of March to the 30th of March, 1908; that on the 30th of March, 1908, the plaintiff having wholly failed and refused
278 to produce said receipts or evidences showing she had paid such past due telephone rentals, the defendant pursuing its usual course and custom, presented its bill to the plaintiff with a request that she produce her said receipts or evidences showing she was not indebted for said bill, or that she pay said bill, and that the plaintiff then and there declined to produce said receipts or evidences showing she was not indebted to defendant and declined to pay said bill, and that defendant thereupon disconnected her telephone service and refused to furnish her future telephone service for the reason she had not paid her past bill and for no other reason.

9th. The court erred in refusing to allow defendant to prove that for many years prior to March, 1908, it, the defendant, had uniformly enforced against all persons similarly situated with the plaintiff, its rule and regulation with reference to furnishing future telephone service where parties were, like plaintiff, shown to be indebted to it for past services, until such person had paid such past indebtedness, and had uniformly required such persons similarly situated with the plaintiff, to pay such past indebtedness as a condition upon which such future service would be rendered, and that, in the enforcement of such rule and regulation, it did not discriminate against the plaintiff, but that it uniformly enforced such rule and regulation; and that such rule and regulation were adopted and enforced by it in good faith and under the belief that it had a right to adopt and enforce said rule and regulation.

10th. The court erred in allowing the plaintiff, Mrs. Adelia P. Danaher to testify over the objection of defendant as follows:

"Q. The question is, these two items on this bill for the month of April, showing the old balance of $4.00 and the $2.75.
279 when you paid the $2.75 did you tell the collector what you were paying?

A. Yes, I was paying for that month.

"Q. The question is, did you tell the collector what you were paying it for?

A. Why—yes."

On account of the witness having previously testified she did not state to the collector what she paid it for, also on the ground that the questions are leading.

11th. The court erred in refusing to allow the defendant to ask the plaintiff, Mrs. Adelia P. Danaher why she paid or offered to pay on the 29th of April, for telephone service for the month of April when she knew she had received no service for that month.

12th. The court erred in refusing to allow witness, L. M. Loring, to testify on behalf of defendant, after being shown the receipt for March showing a total amount of $4.00, and the payment of $2.00, how the $2.00 was applied.

13th. The court erred in refusing to allow witness, L. M. Loring, to answer the following question asked by defendant:

"Q. Do you know Mr. Loring, in this particular case, whether on the 8th of May, or at any other time in 1908, all these charges that appear on your books against Mrs. Danaher were credited off because of the fact that she had no service from the 30th of March to the 8th of May, 1908."

14th. The court erred in refusing to allow the defendant to prove the following by witness L. M. Loring: That he was Manager of defendant's exchange in the City of Little Rock in March, April and May, 1908, that the plaintiff was not charged $2.75 or
280 any other amount for telephone rental for the months of April and May, 1908; that on the 30th of March, 1908, the defendant had sought to remove from the residence of the plaintiff its telephone instrument which the plaintiff had prevented, and that during the months of March, April and May the plaintiff retained possession of said telephone instrument; that defendant's custom and rule of bookkeeping in all cases where telephone instruments were not actually returned to its possession, was to continue on its books a charge against the said telephone instrument and the former paron thereof, its regular monthly charges for the purpose of keeping track of such instrument and finally adjusting any differences that might exist, and that its custom was when said telephone instrument was again put in use and service furnished over it, to credit to such subscriber against whom such debits had been made, an amount in telephone rentals equaling the amount that would have been earned by the Telephone Company and due by the telephone user for such time as intervened between the time that the telephone service was discontinued and the time when such telephone service was restored, and all this was what the defendant did and all that it did, with respect to plaintiff and her telephone.

15th. The court erred in refusing to allow defendant to prove by witness Chas. Vedder the same state of facts as it offered to prove by L. M. Loring.

16th. The court erred in refusing to allow defendant to prove by witness Geo. W. Hughes, the same state of facts as it offered to prove by L. M. Loring.

17th. The court erred in refusing to allow defendant to
281 prove by witness Claude Jefferies, the same state of facts as it offered to prove by L. M. Loring.

18th. The court erred in refusing to allow defendant to prove by witness G. C. Hammond, that in January and February, 1907, plaintiff failed to pay her telephone rental amounting to $4.00, and that the books showed payments on account and balances carried

forward from month to month from March 30th, 1907 down to March 30th, 1908, and that he kept the books from August 1907 to February 1908, and that Charles Vedder was his assistant bookkeeper; that the books were correctly kept and showed no alterations nor erasures, and that the amounts paid were always credited on the back months and the balances brought up and charged against the two months next preceding the current month, the balance of $4.00 always showing in red ink.

19th. The court erred in refusing to allow defendant to prove by witness Earnest Sowells, that prior to being a bookkeeper he was collector for the Telephone Company and called on Mrs. Danaher several times during the year 1907, from month to month with bills showing the balance of $4.00 and the charge of $2.00 for the current month; that she claimed to have paid the balance of $4.00, and more than once promised to produce the receipt or receipts; that he collected from her at her residence and that she said to him she didn't then have time to look up the receipts. That in July 1907 he had a bill against her showing a balance of $6.00 and a charge of $2.00 for the current month of July; that she had failed to pay her June bill, and in July she paid him $–.00, which he credited on her account, leaving a balance of $4.00 due. That he knew Mrs.
Danaher and that he dealt with her personally, and that the
282 books showed she made this $4.00 payment on the 15th of
July, 1907, which corresponds with his pocket memorandum of collections made. That the 15th of July, 1907, was one of the times Mrs. Danaher claimed to have the receipts and promised to get them when she got time; that the books showed a balance of $4.00 for January and February 1908, and a charge of $2.00 for the current month of March, with a credit of $2.00 paid on account March 13th, 1908, with a balance of $4.00 carried forward to the April account; that the books showed she paid $2.75 in April and $2.75 in May, and that the books showed that on the 8th of May the Telephone Company charged off to P. & L. the $4.00 balance, and credited to Mrs. Danaher the time she had been out of telephone service, leaving a credit to her account on May 8th of $4.45, which credit remained to her account on the books of the Company to the present date.

20th. The court erred in giving to the jury each of the plaintiff's instructions, numbered 1, 2, 3, 4, 5, 6, 7, and 8, over the several separate objections and exceptions of the defendant.

21st. The court erred in refusing to give to the jury each of the defendant's instructions requested by it, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, to which action of the court in refusing to give each of said instructions, the defendant at the time saved its several separate exceptions.

22nd. Because the verdict is contrary to the law.

23rd. Because the verdict is contrary to the evidence.

24th. Because the verdict is contrary to the law and the evidence.

283 25th. Because the verdict is excessive.

____ ____,

Attorney for Defendant.

Motion for New Trial Overruled.

Which motion for new trial coming on for hearing before the court, and the court being well and sufficiently advised in the premises, after argument of counsel, doth overrule said motion, to which action of the court, in overruling said motion for new trial, the defendant at the time saved its exceptions, and prayed an appeal to the Supreme Court.

284 Time being asked, defendant was granted until the 1 day of Sept. term, 1911, in which to prepare and file bill of exceptions herein.

Signing of Bill of Exceptions.

Now Therefore, within the time granted by the Court comes the defendant and presents to the Court this its bill of exceptions herein, containing all the evidence, instructions, exceptions and proceedings had, and asks that the same be signed, sealed and ordered filed as a part of the record herein, which is accordingly done.

Given under my hand this the 25th day of Sept. 1911.

GUY FULK,
Judge of the Pulaski Circuit Court, Second Division.

Endorsed: "Filed Sept. 25th, 1911. F. J. Ginocchio, Clerk, By O. L. McNair, D. C.

285 *Clerk's Certificate of Transcript.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, F. J. Ginocchio, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the annexed and foregoing is a true and correct transcript of the pleadings, record entries and bill of exceptions in the case of Adelia P. Danaher vs. The Southwestern Telegraph & Telephone Co. as the same appear on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court this 27th day of October, 1911.

[SEAL.] F. J. GINOCCHIO, *Clerk.*
B. H. S. NIXON, *D. C.*

286 *Fee Bill.*

Jury Tax	$ 6.00
Witnesses	12.00
B. L. Roberts, Sheriff	3.40
F. J. Ginocchio, Cl'k ($43.75 pd. by pl'ff; 50c. pd. by Def't).	65.75
" " " (This transcript)	39.00

Attest:
F. J. GINOCCHIO, *Clerk,*
By H. S. NIXON, *D. C.*

287 *Filing in Supreme Court.*

Pulaski, 2nd. Div.

No. 1938.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY
vs.
ADELIA P. DANAHER.

Transcript.

Filed October 28th, 1911.

P. D. ENGLISH, *Clerk.*

288 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 27th day, being the fourth Monday in November, A. D. 1911, amongst others were the following proceedings, to-wit: On the 4th day of December, 1911, a day of said term:

Record Entries.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, Appellant,
vs.
Mrs. ADELIA P. DANAHER, Appellee.

Appeal from Pulaski Circuit Court, Second Division.

The motion to advance and affirm this cause as a delay case being called, the same is now submitted upon the transcript of the record and the briefs filed and is by the Court taken under advisement; and

On the 11th day of December the following proceedings were had in said cause (Omitting caption):

Being fully advised, the motion of the appellee to advance and affirm this cause as a delay case, is by the Court overruled; and

289 On the 5th day of February, 1912, the following proceedings were had in said cause (Omitting caption):

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and by the Court taken under advisement; and

On the 12th day of February, 1912, the following proceedings were had in said cause (Omitting Caption):

Judgment.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, Second Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and Herman Kahn, surety in the supersedeas bond filed in this cause, the sum of Six Thousand and Three Hundred Dollars, with interest thereon at six per cent. from the 10th day of May, A. D. 1911, until paid, the amount of judgment of said Circuit Court.

It is further considered that said appellee recover of said appellant and said surety all her costs in this Court and the Court below in this cause expended, and have execution thereof.

290 In the Supreme Court of Arkansas, February 12, 1912.

No. 165.

S. W. TEL. & TEL. CO.
v.
DANAHER.

Statement by the Court.

This action was here on a former appeal and is reported under the style of Danaher vs. Sw. T. & T. Co., 94 Ark., 533. The action is for a recovery of the statutory penalties under section 7948 of Kirby's Digest for an alleged discrimination against the plaintiff in refusing her telephone service.

The controversy arose because the defendant company refused plaintiff telephone service until she could pay a claim for past due services, which the defendant contends she owed, and which the plaintiff insists she did not owe. Reference is made to the former decision for a more extended statement of the issues. After the case was remanded for a new trial, substantially the following testimony was introduced:

For several years prior to March 30, 1908, the plaintiff had a telephone in her residence in the City of Little Rock; on the date mentioned, it was disconnected from the exchange and remained disconnected until the 8th day of May. During this time plaintiff tried to get the central office every day but got no response. The reason for doing this was because the telephone company refused her further service until she should pay a claim it had against her for past due services, which she contended she did not owe. She

paid $2 to the defendant company at its office in Little Rock on March 13th, 1909, and said that she paid this for services for the month of March. Commencing with the month of April,
291 service for telephone in residences was raised to $2.75 per month, but subscribers were given a rebate of fifty cents when they paid before the 15th of the current month. The plaintiff tendered $2.25 at the office of the company before the 15th of April, but the defendant told her that she was not entitled to the discount unless she paid the back bill, and on the 29th day of April, she paid $2.75 to the company. On the second day of May she went to the office of the company and told them that she wanted to pay for that month. She first offered to pay $2.25, but they told her that she was not entitled to the 50 cts. discount unless she paid its claim for past services. She then paid the company $2.75 and told them that it was for the month of May.

The following agreed statement of facts was also introduced:

"It is agreed that during the months of April and May, 1908, the defendant had in operation in Little Rock, Arkansas, more than five thousand telephones, a majority of which were in private residences; that under the rules of the defendant during these months all residence telephone subscribers were charged $2.75 per month, from which a deduction of fifty cents a month was made in all cases where the rentals were paid by the subscribers on or before the 15th day of said month.

"It is agreed as a fact in the case that the defendant telephone company cut off plaintiff's telephone on the 30th of March, 1908, and refused to give plaintiff further telephone service thereafter for the reason that the defendant claimed that the plaintiff owed it for telephone service theretofore rendered, which claim on the part of the telephone company was disputed by the plaintiff, she claiming that she did not owe the telephone company for any service rental in the past."

292 The Jury returned the following verdict:

"We, the jury, find a verdict in favor of the plaintiff, as follows:

"From March 30 to May 8, 1908, inclusive, making 40 days at $100.00 (one hundred dollars) per day, for non-service, making $4,000.00 (four thousand dollars) and, from May 9th to May 31st, 1908, inclusive, 23 days, at $100.00 (one hundred dollars) per day, making $2,300.00, (making twenty-three hundred dollars) for discrimination. Making a total verdict of $6,300.00 (sixty-three hundred dollars) in favor of plaintiff."

From the judgment rendered the defendant has duly prosecuted an appeal to this court.

Opinion.

HART, *J.* (after stating the facts):

The telephone company has the right to make and enforce reasonable rules and regulations for the guidance of its subscribers, and in case the subscriber refuses to obey such regulation, may refuse to

furnish telephone service, without being guilty of discrimination and such right was recognized by the court on the former appeal of this case. We held in addition that where a subscriber refuses to pay charged for past services but properly asked the telephone company to reinstate his telephone in his residence, his demand for reinstatement is not barred by his refusal to pay for past services which he claims he does not owe.

Mr. Justice Battle, speaking for the court, said:

"A telephone company, being a public servant, cannot refuse to serve any one of the public in that capacity in which it
293 has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It cannot refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services, it has a right to demand no more than the rate of charge fixed for such services. It transcended its duty to the public when it demanded more (citing authorities).

"A tender or payment to the telephone company of its rate or charge for service or rent of telephone for any particular time and offer to comply with its reasonable rules and regulations would entitle the applicant to such service or rent. Should the telephone company incur a penalty by refusing to rent or render such service, it could prevent the increase thereof by rendering or offering to render the applicant such service."

The decision on the former appeal is the law of the case. Therefore, under the undisputed evidence as disclosed by the record, and as stated above, we think the present appeal is controlled by the decision on the former appeal.

Counsel for the defendant with great earnestness and with much force have undertaken to escape this conclusion. The effect of their argument as we understand it is, that there is no discrimination under the statute where the defendant enforces an unreasonable rule against all who refuse to obey it, but that discrimination arises where the company enforces an unreasonable rule against some and not all, of its subscribers who refuse to obey it. The fallacy of their argument is that by such a course, the defendant by enforcing an unreasonable rule against all of its subscribers who refuse to obey it, could entirely abrogate the statute, release the defendant
294 from the penalties expressly prescribed by the statute and remit subscribers who refuse to obey its unreasonable rules to their remedy by mandamus or such other remedy as might be available under the common law. They contend that telephone companies under the common law are prohibited from making discrimination in the performance of the service required of them and that section 7948 of Kirby's Digest is merely declaratory of the common law. This may be true, but it is equally true that the object and purpose of the statute is to compel telephone companies to perform the duties required of them, both in supplying telephone service and in preventing discrimination to its subscribers. Having held on the former appeal that a telephone company cannot refuse to furnish telephone connection to one until he pays a debt

contracted for services rendered in the past, it seems to us that it necessarily follows that the plaintiff is entitled to recover for the forty days during which her telephone was disconnected and telephone service was refused her. She was ready, willing and able to pay and did pay for the service and was in the same situation as all other persons who had telephones installed in their residences.

In regard to the 23 days subsequent to the 8th of May, the defendant did render her services, but charged her fifty cents more than it did to other subscribers for residence telephones. They say they did this for two reasons: First—because she refused to pay their claim for past services, and second—because under their rules they allowed no discount to subscribers who were in arrears for past services.

It follows from the ruling in the former appeal that the defendant could not make a rule or regulation whereby they would
295 charge a subscriber who was in arrears to them for past services, a greater sum for telephone services than it did for those who had paid their bill.

The evidence shows that all persons having telephones in their residences received a discount of 50 cents if they paid for the service before the 15th of the month. The plaintiff belonged to this class of persons, and it was a discrimination against her to charge her more than it did other persons who had telephones in their residences. See, also, S. W. Tel. & Tel. Co. v. Murphy, —— Ark. Law Rep. —, 140 S. W. 720.

Telephone companies by the necessities of commerce and by public use have become common carriers of communications and as such must supply all alike, who are alike situated and can not discriminate in favor of or against anyone. The plaintiff as above stated was a resident of the city, and as above stated was ready and willing and able to pay for the reinstallation of telephone service in her residence and did pay for the same. Therefore, she was in a similar situation to all other persons who were receiving telephone services in their residences, and as stated in our former opinion, the telephone company could have obviated the payment of a penalty in this case by rendering to the plaintiff the telephone service.

The judgment will be affirmed.

296 In the Supreme Court of Arkansas.

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY,
Appellant,
vs.
ADELIA P. DANAHER, Appellee.

Substituted Motion for Rehearing.

Comes the appellant, the Southwestern Telegraph & Telephone Company, and prays the court to set aside the order and judgment in this cause made on the 12th day of February, 1912, and grant it a rehearing, upon the following grounds, to-wit:

1. The court erred in construing Section 7948 of Kirby's Digest as a legislative enactment to compel the appellant under the penalties named in the act to supply telephone facilities and furnish service to all persons who apply for same.

2. Because the construction placed upon the act by the court renders the act void, as in conflict with the 14th amendment to the constitution of the United States, and especially in conflict with that part of the 14th amendment which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Because the statute as interpreted by the court, requires appellant to supply telephone facilities and to furnish telephone connections and service under severe penalties, without fixing a criterion of the facilities and service to be furnished, and without any
297 reference to the ability or obligation of the appellant to furnish the same, and without an opportunity of being heard with reference to its obligation or duty, upon the hazard of the severe penalties prescribed by the act.

4. Because while the statute expressly gives to the appellant the right to prescribe reasonable regulations for the conduct of its business, the statute as construed by the court inflicts a severe penalty for the impartial enforcement of a regulation believed to be reasonable if it should be declared unreasonable by any court of competent jurisdiction. The statute as interpreted fixes no standard for determining what regulations are reasonable, and yet, inflicts severe penalties if the regulation is held to be unreasonable. The statute as written, and the statute as interpreted, are both in violation of the 14th amendment of the Federal Constitution, and especially in violation of those provisions of the amendment which are set forth above.

5. Because the statute as interpreted by the court is so indefinite and uncertain that its enforcement under severe penalties deprives the appellant of its property without due process of law, and denies to it the equal protection of the laws, in violation of the 14th amendment to the Federal Constitution.

6. The court erred in holding that the decision of this court heretofore rendered on the former appeal in this case was the law of the case.

7. The court erred in holding under the evidence in this case that appellant had discriminated against appellee.

298 8. The court erred in holding that the enforcement by the appellant of a rule which it enforced against all persons in like situations was in contravention of Section 7948 of Kirby's Digest.

9. The court erred in refusing to consider the bona fides and good faith of the appellant in adopting and enforcing a rule or regulation which it believed to be reasonable as a defense in a suit for penalties under Section 7948 of Kirby's Digest.

10. The court erred in holding that said section is sufficiently definite and certain to apprize telephone companies in advance as to whether any rule or regulation adopted by such company in good faith is reasonable or unreasonable, and in holding that a telephone

company, regardless of its bona fides and good faith, adopts and enforces every rule and regulation at its peril.

11. The court erred in refusing to hold that, while section 7948 of Kirby's Digest permits a telephone company to adopt and enforce reasonable rules and regulations, it does not define what are reasonable rules and regulations except such discrimination as results by requiring as a condition for furnishing telephone facilities that they shall not be used in the business of the applicant; and that said section as to all discrimination that results from the enforcement of a uniform rule adopted and enforced in good faith, except such as is so specificially pointed out in said section, is too indefinite and uncertain, for that no telephone company can determine in advance what is or is not a reasonable rule or regulation.

12. The court erred in refusing to hold that the statute sued on is void for that it is too indefinite and uncertain to advise as *as* to what rule or regulation is reasonable or unreasonable, except
299 that it especially prohibits any telephone company from discriminating against any individual or company engaged in lawful business by requiring as a condition for furnishing telephone facilities that they shall not be used in the business of the applicant.

13. The court erred in holding that section 7948 of Kirby's Digest is constitutional and valid.

14. The court erred in holding that appellant's rule requiring the payment of past due telephone rentals as a condition for furnishing future service is unreasonable, and that said rule or regulation was prohibited under the penal laws of this State, and that the appellant knew and should have known that said rule was unreasonable and that the adoption and enforcement of the same was prohibited under the penal laws of this State.

15. The court erred in holding that the penal law sued on herein under the evidence shown and offered to be shown by the record in this case was meant to apply to such a case.

16. The court erred in holding that the object and purpose of Section 7948 of Kirby's Digest is to compel telephone companies to perform the duties required of them, both in supplying telephone service and in preventing discrimination to its subscribers.

17. The court erred in holding that if the appellant were permitted to enforce an unreasonable rule against all of its subscribers who refused to obey it, it, the appellant, could thereby abrogate the statute and escape the penalties prescribed thereby.

18. The court erred in holding that the appellant did not have the right to make and enforce a rule whereby the appellant
300 could refuse to give the fifty cents per month discount to those who were in arrears for the past month's rental when the appellant permitted such discount to those who were not so in arrears.

Wherefore, the appellant prays that said order and judgment of this court be set aside and held for naught, and that it have such other and further relief under the law as it may be entitled to.

A. P. WOZENCRAFT,
W. J. TERRY,
COLEMAN & LEWIS,
Attorneys for Appellant.

I, Walter J. Terry, attorney for appellant, hereby certify that in my opinion the foregoing petition for rehearing is well founded in law, and that the same is respectfully and in good faith presented to this court for its consideration.

W. J. TERRY,
Attorney for Appellant.

Endorsed on back: Southwestern Telegraph & Tel. Co. vs. Adelia P. Danaher. Substituted Petition for rehearing. Filed March 4, 1912. P. D. English, Clk., by W. P. Sadler, D. C.

301 And on the 26th day of February, 1912, the following proceedings were had in this cause (omitting caption):

Comes the appellant by attorney and files a petition for rehearing, and prays for two weeks' time in which to prepare and file a brief in support thereof, which time is by the Court granted.

And on the 4th day of March, 1912, the following proceedings were had in this cause (omitting caption):

Comes the appellant by attorneys, and by leave of court files a substituted petition for rehearing.

And on the 11th day of March, 1912, the following proceedings were had in this cause (omitting caption):

The petition for rehearing filed by the appellant herein being now called, the same is submitted, and by the Court taken under advisement.

Rehearing Denied.

And on the 18th day of March, 1912, the following proceedings were had in this cause (omitting caption):

Being fully advised, the petition for rehearing filed by the appellant herein, is by the Court overruled.

302 *Certificate of Authentication.*

SUPREME COURT, STATE OF ARKANSAS, *ss:*

I, Peyton D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Southwestern Telegraph & Telephone Company, a corporation, Plaintiff, vs. Mrs. Adelia P. Danaher, Defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 5th, 1912.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

303 Supreme Court of Arkansas.

No. 1938.

Mrs. ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, a Corporation, Defendant.

Assignment of Errors.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the U. S. Supreme Court, makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Section 7948 of Kirby's Digest of the Statutes of Arkansas, being Section 11 of the Act of the General Assembly of the State of Arkansas, approved March 31, 1885, was valid. The validity of said section was denied and drawn in question by the defendant on the ground that it is repugnant to the constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding,

First. That said Section 7948 of Kirby's Digest did not abridge the privileges and immunities of citizens or of this defendant, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Second. That said Section 7948 as applied to this defendant did not deprive it of its property without due process of law, nor
304 deny to it the equal protection of the law, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Third. That said section 7948 requires the defendant, under a penalty of $100.00 per day, to furnish telephone connection and facilities to all applicants, which construction of the statute deprives the defendant of its property without due process of law, in contravention of the Fourteenth Amendment to the Federal constitution.

Fourth. That while said section 7948 expressly authorizes the defendant to establish reasonable regulations for the conduct of its business, the exercise of such authority is subject to the hazard of a penalty of $100.00 per day, if the court shall declare the regulation to be unreasonable, though the statute prescribes no criterion by which the reasonableness of the regulation can be determined by the defendant in advance of a judicial decision,—which construction deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Fifth. That said section 7948 makes the enforcement of a regulation, though adopted in good faith and enforced impartially against all subscribers in a like situation, a discrimination under the

statute, involving a penalty of $100.00 for each day during which it has been enforced, if the court shall determine that the regulation is unreasonable,—which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention to the Fourteenth Amendment to the Federal Constitution.

Sixth. That the said section 7948 subjects the defendant to a penalty of $100.00 for each day that it fails to furnish tele-
305 phone connection and facilities, or during which it may discriminate against any subscriber, without specifying what connection or facilities should be furnished, and without any reference to the ability of the defendant to supply such connection and facilities, and without providing any criterion for determining what should constitute a discrimination, and does not permit the defendant to try these questions in the courts of the state without assuming the hazard of a penalty of $100.00 per day during the pendency of such suit, if it should be decided against the defendant,—which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Seventh. That said section 7948 requires the defendant to furnish telephone connection and facilities to subscribers even though they are in arrears for past service, and prohibits it from refusing to furnish telephone connection and facilities to anyone on the ground that they have failed or refused to pay for services already furnished,—which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Eighth. That the penalties prescribed by said section 7948 are reasonable and enforceable,—which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

For which errors, the defendant, the Southwestern Telegraph & Telephone Company, prays that the said judgment of the
306 Supreme Court of the State of Arkansas, dated the 12th day of February, 1912, be reversed and a judgment rendered in favor of the defendant company, and for costs.

WALTER J. TERRY,
A. P. WOZENCRAFT,
WILLIAM M. LEWIS,
CHARLES T. COLEMAN,
Attorneys for S. W. T. & T. Company.

Filed June 5, 1912.

PEYTON D. ENGLISH, *Clerk.*

307 In the Supreme Court of Arkansas.

No. 1938.

Mrs. ADELIA P. DANAHER, Plaintiff,
vs.
SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, a Corporation, Defendant.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the defendant, the Southwestern Telegraph & Telephone Company, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of the supersedeas bond.

Assignment of errors herewith.

W. J. TERRY,
A. P. WOZENCRAFT,
W. M. LEWIS,
CHAS. T. COLEMAN,
Attorneys for Defendant.

STATE OF ARKANSAS,
Supreme Court:

Let the writ of error issue upon the execution of a bond by the Southwestern Telegraph & Telephone Company to Mrs. Adelia P. Danaher, in the sum of $8000.00, such bond when approved to act as a supersedeas.

Dated June 5th, 1912.

EDGAR A. McCULLOCH,
Chief Justice Supreme Court of the State of Arkansas.

Filed June 5, 1912.
PEYTON D. ENGLISH, *Clerk.*

308 THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, a Corporation, Plaintiff in Error,
vs.
Mrs. ADELIA P. DANAHER, Defendant in Error,

Bond.

Know all men by these presents, that we, the Southwestern Telegraph & Telephone Company as principal, and Geo. W. Rogers and Herman Kahn as sureties, are held and firmly bound unto Mrs. Adelia P. Danaher, in the sum of $8000.00 to be paid to the said Mrs. Adelia P. Danaher, to which payment, well and truly to be

made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 17th day of April, 1912.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the U. S. to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas, *and*

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY,
By W. J. STIMSON,
Division Superintendent.
GEO. W. ROGERS.
HERMAN KAHN.

Attest:
——— ———, *Secretary.*

309 STATE OF ARKANSAS,
Pulaski County:

Geo. W. Rogers and Herman Kahn, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Arkansas, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of $8000.00 over and above all debts and liabilities and exemptions.

GEO. W. ROGERS.
HERMAN KAHN.

Subscribed and sworn to before me this the 5th day of June, 1912.

[SEAL.] Z. B. CURTIS,
Notary Public.

Bond approved, and to operate as a supersedeas.

EDGAR A. McCULLOUGH,
Chief Justice Supreme Court of Arkansas.

Filed June 5th, 1912.

PEYTON D. ENGLISH, *Clerk.*

310 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between Mrs. Adelia P. Danaher, and the Southwestern Telegraph & Telephone Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Southwestern Telegraph & Telephone Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected,

311 and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 5th day of June, in the year of our Lord one thousand nine hundred and twelve.

[The Seal of the District Court, East. Dist. Ark., Western Division.]

SID B. REDDING,
Clerk District Court United States for the Western Division of the Eastern District of Arkansas.

Allowed.
EDGAR A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed June 5, 1912.
PEYTON D. ENGLISH, *Clerk.*

312 *Certificate of Lodgment.*

Supreme Court of the State of Arkansas.

I, P. D. English, clerk of said court, do hereby certify that there was lodged with me as such clerk on — day of April, 1912, in the matter of the Southwestern Telegraph & Telephone Company, a corporation, vs. Mrs. Adelia P. Danaher:

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Little Rock, Arkansas, this the 5th day of June, 1912.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

313 *Citation.*

The President of the United States to Mrs. Adelia P. Danaher, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to the writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the Southwestern Telegraph & Telephone Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 5th day of June, 1912.

EDGAR A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Attest:

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *June 5th*, 1912.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

PALMER DANAHER,
Attorney for Mrs. Adelia P. Danaher.

Filed June 5th, 1912.

PEYTON D. ENGLISH, *Clerk.*

314 *Return to Writ of Error.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Arkansas, in the City of Little Rock, Arkansas, this 5th day of June, 1912.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

Costs of Suit.

Circuit Court Costs, 1st appeal	$83.65
" " " 2nd Do.	152.65
Transcript on Error & fees, clerk, to U. S. Supreme Court	$105.00

Attest:
PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 23,304. Arkansas Supreme Court. Term No. 729. The Southwestern Telegraph and Telephone Company, plaintiff in error, vs. Mrs. Adelia P. Danaher. Filed July 22d, 1912. File No. 23,304.

No. 43

Office Supreme Court, U. S.
FILED
JAN 26 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

No. [redacted]

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY..*Plaintiff in Error,*

v.

ADELIA P. DANAHER....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

Brief for Plaintiff in Error.

CHARLES T. COLEMAN,
For Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

No. 729.

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.....*Plaintiff in Error,*

v.

ADELIA P. DANAHER.....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action by Mrs. Adelia P. Danaher, hereafter called the plaintiff, against the Southwestern Telegraph & Telephone Company, hereafter called the defendant, to recover penalties aggregating $6,300, being at the rate of $100 a day, for an alleged discrimination against her in the matter of telephone service, under a statute

passed by the General Assembly of the State of Arkansas on March 31, 1885, which is as follows:

> "Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality; provided, such applicants comply, or offer to comply, with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination, and refuses such facilities after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

Kirby's Digest, sec. 7948.

In 1908, and for many years prior thereto, the defendant operated a telephone exchange with about five thousand subscribers in the city of Little Rock. During the time mentioned, the defendant enforced, without discrimination or partiality, a rule or regulation that it would not furnish telephone service to any subscriber who was in arrears for past services. The rental for residence telephones was $2 a month, payable in advance.

The defendant claimed that the plaintiff owed $4 for two months' service, and numerous written and verbal notices were given to the plaintiff that if she did not pay the amount so claimed, her telephone would be disconnected. She refused to pay, and her telephone was disconnected. It remained disconnected from March 30, 1908, to May 8, 1908, a period of forty days.

Some time before the 1st of May, 1908, the telephone rates were increased from $2 to $2.75 a month for residences, but the defendant promulgated a rule that it would allow a discount of fifty cents to each subscriber who paid before the 15th of the current month, provided he were not in arrears for past service. The discount reduced the rate to $2.25 a month. The plaintiff paid $2.75 on the 29th of April, and a like amount on the 2d of May, intending that each payment should apply on the current month. As said before, her telephone was disconnected on the 30th of March, and reinstated on the 8th of May.

On the 30th of May, 1908, the plaintiff commenced an action against the defendant to recover the statutory penalty of $100 a day for the forty days from March 30 to May 8, 1908, both inclusive, aggregating $4,000. She alleged that telephone service during this time was furnished to other subscribers similarly situated, and that

the refusal to furnish her with service constituted an arbitrary discrimination in violation of the statute set forth above (Record, p. 1).

The defendant answered that it disconnected the plaintiff's telephone because she owed a balance of $4 for past service, which she refused to pay. It pleaded that it had established the rule that telephone service would not be furnished to persons who neglected or refused to pay their telephone rentals for preceding months, and that this rule had been enforced universally against all subscribers. It further answered that to require it to furnish telephone facilities without pay, and to force it to do so by inflicting the penalties prescribed by the statute set forth above, would deprive it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States (Record, pp. 3-5).

At the trial in the circuit court, evidence was introduced in support of the contentions of both parties. The court instructed the jury to find for the defendant, evidently holding that the plaintiff could not demand telephone service while she was in arrears (Record, p. 79). The plaintiff appealed.

On appeal, the Supreme Court held that the rule that telephone service would not be furnished to

patrons in arrears, was unreasonable. The court said:

> "A telephone company, being a public servant, can not refuse to serve any one of the public in that capacity in which it has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It can not refuse to serve him until he pays a debt contracted for services rendered in the past" (Record, p. 85).

The judgment was reversed, and the cause remanded for a new trial.

The plaintiff amended her complaint in the circuit court by alleging, as an additional discrimination for the month of April and for the first eight days of the month of May, 1908, that before the 15th of each of those months, she tendered $2.25 for telephone service for the current month, but that the defendant demanded and received $2.75 for each of said months, while it only charged others similarly situated $2.25 a month. She alleged that this also constituted a discrimination for the remaining twenty-three days of May. The prayer was for the penalties aggregating $4,000 originally sued for, and for $2,300 for the remaining twenty-three days of May, making a total of $6,300 (Record, p. 90).

For answer to the amended complaint, the defendant denied that it demanded $2.75 a month

for the months of April and May, 1908. It alleged that the plaintiff tendered $2.25 for each of those months, but that it was not accepted because she owed a balance for past services; that she paid $2.75 on the 29th of April, and $2.75 on the 2d of May, but she was advised that these amounts were only accepted as credits on her account; and that on the 8th of May, her telephone was again connected with the exchange, it appearing on that date that her entire account had been paid in full. The answer again pleaded the rule that telephone service would not be furnished to any one in arrears for past service, and alleged that this rule had been adopted in good faith, under the belief that it was authorized both by the common law and by the statute; that the defendant had no means of knowing that it would be held to be unreasonable; that neither the common law nor the statute fixed a standard by which to determine in advance of a judicial decision whether the rule was reasonable or unreasonable; and that if the penalties prescribed are to be inflicted on account of the impartial enforcement of this rule, the statute is in conflict with the Federal Constitution, and especially in conflict with the Fourteenth Amendment thereto, because it takes the defendant's property without due process of law, and it denies to the defendant the equal protection of the law (Record, p. 92).

The plaintiff introduced evidence tending to support the allegations of her complaint. The defendant offered to prove that the plaintiff was indebted to it for two months' service at the time her telephone was disconnected; that she was notified time and again that her telephone would be disconnected if she did not pay the amount past due; that she refused to pay, and her telephone was disconnected on that acount alone; that a rule had been in force for a number of years to the effect that telephone service would not be furnished to patrons in arrears; that this rule had been enforced universally against all subscribers, without partiality or discrimination; that when the rates for telephones in residences were increased from $2 to $2.75 a month, the defendant established another rule that it would allow a discount of fifty cents to each subscriber who paid before the 15th of the current month, provided the subscriber was not in arrears for past service; and that this rule had been enforced without partiality or discrimination. All this evidence was excluded. There was a judgment for the plaintiff for $6,300, the full amount sued for, and the defendant appealed (Record, p. 98).

On the second appeal the Supreme Court adhered to its former holding that the rule that telephone service would not be furnished to a subscriber who was indebted for past service, was

unreasonable, and that its enforcement subjected the defendant to the penalty of $100 a day prescribed by the act referred to. The court held that the rule that a discount would not be allowed on a payment made before the 15th of the current month, if the subscriber was in arrears for past service, while a discount would be allowed on such a payment, if the subscriber was not in arrears, was likewise unreasonable, and that its enforcement also subjected the defendant to the statutory penalties. In this connection, the court said:

> "In regard to the twenty-three days subsequent to the 8th of May, the defendant did render her services, but charged her fifty cents more than it did to other subscribers for residence telephones. They say that they did this for two reasons: First, because she refused to pay their claim for past services, and, second, because, under their rules, they allowed no discount to subscribers in arrears for past services. It follows from the ruling in the former appeal that the defendant could not make a rule or regulation whereby they would charge a subscriber who was in arrears to them for past services, a greater sum for telephone services than it did for those who had paid their bill" (Record, p. 158).

The defendant filed a petition for a rehearing, in which it insisted that the statute, as construed by the court, was in conflict with the Fourteenth Amendment to the Federal Constitution, because, as construed, it deprived the defendant of its

property without due process of law, and denied to it the equal protection of the law (Record, p. 158). The motion was overruled, and the judgment of the circuit court was affirmed (Record, pp. 161-168). The first opinion of the Supreme Court will be found on pages 83 to 86 of the record, and the second opinion will be found on pages 155 to 158.

Specification of Errors.

The Supreme Court of Arkansas erred in holding and deciding that section 7948 of Kirby's Digest of the Statutes of Arkansas, being section 11 of the act of the General Assembly of the State of Arkansas, approved March 31, 1885, was valid. The validity of said section was denied and drawn in question by the defendant on the ground that it is repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding

First. That said section 7948 of Kirby's Digest, did not abridge the privileges and immunities of citizens or of this defendant, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Second. That said section 7948, as applied to this defendant, did not deprive it of its property without due process of law, nor deny to it the equal protection of the law, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Third. That said section 7948 requires the defendant, under a penalty of $100 per day, to furnish telephone connection and facilities to all applicants, which construction of the statute deprives the defendant of its property without due process of law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Fourth. That while said section 7948 expressly authorizes the defendant to establish reasonable regulations for the conduct of its business, the exercise of such authority is subject to the hazard of a penalty of $100 per day, if the court shall declare the regulation to be unreasonable, though the statute prescribes no criterion by which the reasonableness of the regulation can be determined by the defendant in advance of a judicial decision, which construction deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Fifth. That said section 7948 makes the enforcement of a regulation, though adopted in good faith and enforced impartially against all subscribers in a like situation, a discrimination under the statute, involving a penalty of $100 for each day during which it has been enforced, if the court shall determine that the regulation is unreasonable—which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Sixth. That the said section 7948 subjects the defendant to a penalty of $100 for each day that it fails to furnish telephone connection and facilities, or during which it may discriminate against any subscriber, without specifying what connection or facilities should be furnished, and without any reference to the ability of the defendant to supply such connection and facilities, and without

providing any criterion for determining what should constitute a discrimination, and does not permit the defendant to try these questions in the courts of the State without assuming the hazard of a penalty of $100 per day during the pendency of such suit, if it should be decided against the defendant—which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Seventh. That said section 7948 requires the defendant to furnish telephone connection and facilities to subscribers, even though they are in arrears for past service, and prohibits it from refusing to furnish telephone connection and facilities to any one on the ground that they have failed or refused to pay for services already furnished, which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution.

Eighth. That the penalties prescribed by said section 7948 are reasonable and enforceable, which construction of the statute deprives the defendant of its property without due process of law, and denies to it the equal protection of the law, in contravention of the Fourteenth Amendment to the Federal Constitution (Record, p. 162).

POINTS AND AUTHORITIES.

I.

Construction of the Act of March 31, 1885.

(a) The Issue.

(b) Construction contended for.

Cumberland Telephone Company v. Kelly, 160 Fed. 316.

Pacific Telephone Company v. Railway, 66 Md. 399.

Plummer v. Hattelstead, 117 N. W. Rep. 680.

Smith v. Southwestern Telegraph & Telephone Company, 158 S. W. 980.

Hockett v. State, 105 Ind. 250.

Central Union Telephone Company v. State, 106 Ind. 1.

State v. Citizens Telephone Company, 61 S. C. 83.

Cumberland Telephone Company v. Hendon, 71 S. W. 435.

State v. Nebraska Telephone Company, 17 Neb. 126.

People v. Gas Light Company, 45 Barb. 146.

Postal Telegraph Company v. Cumberland Telephone Company, 177 Fed. 726.

Jones on Telephone & Telegraph Companies, secs. 495, 496.

(c) Construction placed on act by the Supreme Court of Arkansas.

II.

Act of March 31, 1885, as Construed by the Supreme Court of Arkansas, Is in Conflict with the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Missouri Pacific Railway Company v. Nebraska, 217 U. S. 196.

Missouri Pacific Railway Company v. Tucker, decided June 16, 1913.

(a) Right to make regulations.

Cumberland Telephone Company v. Kelly, 160 Fed. 316.

Stamey v. Western Union Telegraph Company, 18 S. E. 1008.

McDaniel v. Faubush Telephone Company, 106 S. W. 825.

Western Union Telegraph Company v. Neil, 25 S. W. 15.

Davis v. Western Union Telegraph Company, 32 S. E. 1026.

3 Thompson on Corporations (2 ed.), 2110.

37 Cyc. 1619.

(b) Duty to make regulations.

(c) Regulations reasonable.

Rushville Co-operative Telephone Company v. Irvin, 27 Ind. App. 62.

Tacoma Hotel Company v. Tacoma Land Company, 3 Wash. 316.

Western Union Telegraph Company v. McGuire, 104 Ind. 130.

Vanderberg v. Gas Company, 126 Mo. App. 600.

Jones v. Nashville, 72 S. W. 985.

Watauga Water Company v. Wolfe, 41 S. W. 1060.

Shiras v. Ewing, 26 Pac. 320.

Buffalo Telephone Company v. Turner, 118 N. W. 1064.

Brass v. Rathbone, 47 N. E. 905.

Hewlett v. Western Union Telephone Company, 28 Fed. 181.

Yancey v. Batesville Telephone Company, 81 Ark. 586.

Southwestern Telegraph & Telephone Company v. Murphy, 100 Ark. 546.

Phillips v. Southwestern Telegraph & Telephone Company, 72 Ark. 478.

Cumberland Telephone Company v. Kelly, 160 Fed. 316.

III.

Act of March 31, 1885, as Construed by the Supreme Court of Arkansas, Is in Conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Cotting v. Kansas City Stock Yards Company, 183 U. S. 79.

Ex parte Young, 209 U. S. 123.

ARGUMENT.

I.

Construction of the Act of March 31, 1885.

As plaintiff in error does not contend that the act of March 31, 1885, as it was passed by the legislature, is unconstitutional, but does contend that the construction placed on the act by the courts of the State brings it into conflict with the Federal Constitution, it may not be out of place to emphasize the difference between the act as written and the act as construed, by stating the

issues raised by the facts, the construction contended for by the plaintiff in error, and the construction adopted by the Supreme Court of the State.

A.

The Issue.

By the act of March 31, 1885, every telephone company doing a general telephone business in this State is required to supply all applicants for telephone connection and facilities without discrimination or partiality (provided they comply or offer to comply with the reasonable regulations of the company), and is prohibited from imposing any condition or restriction upon any applicant which is not imposed impartially upon all persons or companies in a like situation. The act prescribes a penalty of one hundred dollars, to be recovered by the applicant, for each day that the discrimination continues.

Basing her action upon this statute, Mrs. Danaher sued the Southwestern Telegraph & Telephone Company for the penalty of one hundred dollars a day for an alleged discrimination against her during the months of April and May, 1908. The complaint alleged two separate and distinct acts of discrimination, covering different but partially overlapping periods.

The plaintiff's telephone was disconnected on March 30, and remained disconnected until May 8, a period of forty days, during which she had no telephone service. It was connected with the exchange on May 8, and she was furnished with telephone service during the remaining twenty-three days of May. It was alleged that the defendant discriminated against the plaintiff during the forty-day period (the month of April and the first eight days of May), by refusing her telephone connection and service, after she had paid or tendered the amount charged others, and had complied with the reasonable regulations of the company, while furnishing telephone service to others in a like situation. And it was alleged that the defendant discriminated against the plaintiff during the entire period of April and May by demanding and receiving the sum of $2.75 for telephone rental for each of those months, while it only demanded and received from others in a like situation the sum of $2.25 per month.

According to the allegations of the complaint, therefore, the discrimination during the month of April, and during the first eight days of May, consisted both in refusing her telephone service while furnishing it to others in a like situation, and in demanding a higher rental than was charged others similarly situated; while the dis-

crimination during the remaining twenty-three days of May, following the 8th, consisted in demanding a higher rate alone. The prayer was for a judgment for penalties aggregating $4,000 for the forty-day period, and for penalties aggregating $2,300 for the twenty-three days in May after the 8th.

The defense was that the defendant had not discriminated against the plaintiff in either of the ways alleged in the complaint.

For years the defendant had in force a rule that it would not supply future service to those who had not paid for service rendered in the past. This rule had been established in the utmost good faith, and had been enforced without discrimination or partiality against all subscribers in every situation. Whether the rule was reasonable or unreasonable, it was equally known to all and was uniformly enforced against all. It had become such an established custom in the defendant's business that a departure from it would have constituted a manifest partiality toward the favored subscriber and an invidious discrimination against all the rest.

The defendant also had a rule that it would allow a discount or rebate of fifty cents to those subscribers who paid their rentals before the 15th of the current month, and whose accounts showed

no unpaid balance for services rendered in the past. This rule was as definite in its terms and as uniform and consistent in its application and enforcement as the one already mentioned, and there was no suggestion that it had not been impartially observed. The regular rental for residence telephones in April and May, 1908, was $2.75 per month. If the discount were properly allowable, the net rental was $2.25. When the plaintiff tendered $2.25 in April and again in May, it was refused for the double reason that it would not be accepted at all, except on account, while her telephone was disconnected because of her refusal to pay her past due indebtedness, and that she was not entitled to the customary discount when her account showed an unpaid balance.

B.

The Construction of the Statute Contended for by the Defendant.

The defendant contended that the statute should be construed in the light of the following well established propositions:

1. Telephone companies, like similar *quasi*-public corporations, are under a general common law obligation to provide adequate facilities for supplying the service which they hold themselves out to perform, and to furnish such service to the public.

2. The common-law obligation to provide and maintain adequate facilities and to furnish the public with service may be enforced in a proper proceeding, or by an action for damages for a disregard of this duty.

3. The common-law obligation to provide and maintain adequate facilities, and to furnish the public with service, is not within the intent or purpose of the act under consideration.

4. By the common-law, telephone companies must furnish equal telephone facilities without partiality or discrimination to all applicants who comply or offer to comply with the reasonable regulations of the company.

5. The statute is merely declaratory of the common-law duty not to discriminate, and it does not broaden or qualify in any manner the common-law obligation.

6. When the positive duty to provide and furnish adequate facilities has been discharged, then the common-law rule under consideration and the statute both prescribe that the service of such facilities shall be furnished to all applicants similarly situated without partiality or discrimination.

7. For a breach of the duty of nondiscrimination, the common law afforded a remedy by mandamus, or by an action for damages, but inflicted no penalty.

8. The sole and only purpose and effect of the statute is to declare the common-law duty of nondiscrimination, and to enforce that obligation by severe penalties.

9. The statutory remedy for discrimination is cumulative, and does not abrogate or affect the remedies afforded by the common law.

10. By the common law, and by the express terms of the statute, telephone companies have a right to make and enforce reasonable rules and regulations for the conduct of their business.

11. An unreasonable regulation may constitute a breach of the common-law duty to provide and furnish the public with adequate facilities and service, or it may constitute a breach of the common-law and statutory obligation not to discriminate. It may involve a breach of both obligations.

12. If an unreasonable regulation merely constitutes a breach of the common-law duty to provide and furnish adequate facilities and service, the only remedies are those afforded by the common law, such as mandamus, an action for damages, and possibly other actions.

13. If an unreasonable regulation constitutes a breach of the common-law and statutory obligation not to discriminate, a special action for the statutory penalties is available, in addition to the remedies afforded by the common law.

14. In an action for the statutory penalties the *gravamen* of the complaint is the ***unlawful discrimination.***

15. If the enforcement of an unreasonable regulation withholds from an applicant the service to which he is entitled, he can only maintain the statutory action for penalties when such regulation constitutes a discrimination against him and in favor of other applicants similarly situated. If the regulation, though unreasonable and therefore void, is impartially enforced against all persons in like situation with the plaintiff, it merely constitutes a violation of the common-law obligation to furnish adequate facilities and service, but does not violate the common-law and statutory duty not to discriminate.

16. Even though a rule which conditions future service upon the payment of arrears for service performed in the past should be held to be unreasonable and therefore void, the enforcement of the rule against an applicant would merely constitute a breach of the common-law obligation to furnish telephone service, if it was applied impartially and without discrimination against all applicants in a like situation.

17. A reasonable regulation may be so partially enforced that it will constitute discrimination, and an unreasonable regulation may be so impartially enforced that it will not be a discrimination.

18. The application of the foregoing principles to the construction of the statute under consideration not only makes the statute sensible, salutary, effective and reasonable (except that the penalty is too severe), but it saves it from many constitutional objections which any other interpretation would necessarily involve.

19. Since telephone companies have an absolute right, both at the common law and under the statute, to make and enforce reasonable regulations for the conduct of their business, a statute which undertakes to penalize any unreasonable regulation, but does not furnish a guide for determining whether a given regulation is reasonable or unreasonable, is void for uncertainty.

20. Such a constitutional objection is obviated by construing the statute as a prohibition against discrimination, and not as a legislative enactment to enforce the common-law obligation to provide reasonably adequate facilities for supplying the service which the company holds itself out to perform, and to furnish such facilities to the public.

21. Public service corporations can not determine in advance, in the absence of some definite

statutory criterion, what regulation will be held by the courts to be unreasonable; but they always have it in their power to know whether they are intentionally discriminating against some particular applicant.

22. A statute imposing a penalty for discrimination may be entirely constitutional, while the same statute, if construed as an indefinite prohibition against unreasonable regulations, may conflict with both the State and the Federal Constitutions.

Cumberland Telephone Company v. Kelly, 160 Fed. 316.

Pacific Telephone Company v. Railway, 66 Md. 399.

Plummer v. Hattelstead, 117 N. W. Rep. 680.

Smith v. Southwestern Telegraph & Telephone Company, 158 S. W. 980.

Hockett v. State, 105 Ind. 250.

Central Union Telephone Company v. State, 106 Ind. 1.

State v. Citizens Telephone Company, 61 S. C. 83.

Cumberland Telephone Company v. Hendon, 71 S. W. (Ky.) 435.

State v. Nebraska Telephone Company, 17 Neb. 126.

People v. Gas Light Company, 45 Barb. 136.

Postal Telegraph Co. v. Cumberland Telephone Co., 177 Fed. 726.

Jones on Telephone & Telegraph Companies, secs. 495, 496.

In accordance with the foregoing principles the defendant contended that the statute was only directed against discrimination, giving a new remedy and imposing severe penalties, and that it was merely declaratory of the common-law. This was the construction placed upon the statute of Tennessee, which is a literal copy of the one under consideration, by the United States Circuit Court of Appeals for the fifth circuit.

Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed. 316.

C.

Construction Placed on the Act by the Supreme Court of Arkansas.

The court did not construe the act as directed solely against discrimination, but interpreted it as a prohibition of unreasonable regulations by telephone companies. And, on this theory, the court held that a rule or regulation which conditioned further service upon the payment of all amounts

due for past service, was unreasonable and void, *under the statute;* and that a rule which allowed a rebate on payments for the current month when made before the fifteenth of the month, if the subscriber was not in arrears, but refused the rebate if the subscriber was in arrears, was likewise void. For the enforcement of these rules against the plaintiff for a period of sixty-three days, she was allowed to recover penalties aggregating $6,300. Of course, the construction of the act adopted by the Supreme Court of Arkansas is binding on this court, when it comes to test the validity of the act under the Federal Constitution.

II.

The Act of March 31, 1885, as Construed by the Supreme Court of Arkansas, Is in Conflict with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Telephone companies are engaged in a *quasi*-public service. For this reason the common law not only gives them the right, but imposes upon them the duty to make reasonable rules and regulations for the conduct of the business which they hold themselves out to do.

No one will deny that, at the common law, public service corporations have the *right* to make

reasonable rules and regulations for the government of the public in its dealings with them. This right is one of the implied powers of such bodies, for the law impliedly confers upon them, in common with other corporations, all those powers which are necessary, in the sense of being needful, appropriate, convenient and suitable, to enable them to exercise the powers specifically granted, and to accomplish the purposes of their creation. The right is expressly recognized and made effective in the act under consideration, and in this respect the statute is merely declaratory of the common law.

Cumberland Telephone & Telegraph Company v. Kelly, 160 Fed. 316.

Stamey v. Western Union Telegraph Co., 18 S. E. (Ga.) 1008.

McDaniel v. Faubush Telephone Co., 106 S. W. (Ky.) 825.

Western Union Telegraph Company v. Neel, 25 S. W. (Tex.) 15.

Davis v. Western Union Telegraph Company, 32 S. E. (W. Va.) 1026.

3 *Thompson on Corporations* (2 ed.) Sec. 2110.

37 Cyc. 1619.

Telephone companies not only have the right, but they are under a *legal duty* to make and enforce reasonable rules and regulations. The duty springs naturally out of the two-fold obligation to furnish the service contemplated by their charters, and to furnish that service without partiality or discrimination.

The duty to furnish service gives rise to an obligation to make rules and regulations, because service of a public character can not be furnished at all without some system of rules to govern the conduct of the corporation and the public in their business relations. The corporation is bound to furnish the service required by its charter, and it is bound to determine, subject to certain restrictions imposed by law, the nature and extent of the service it will render, the time, manner and conditions of performance, and the terms to be complied with on the part of the public. These matters are prerequisites of business operations, and they must be determined by the corporation before it can enter upon the performance of its public functions. The determination of such matters, and the act of putting that determination into practical effect, constitutes the making and promulgation of a rule or regulation. And this is true, whether the matter be resolved into a written formula, or whether it is merely evidenced by a course of conduct.

The duty to establish rules and regulations likewise flows from the obligation to serve the public without partiality or discrimination. This obligation exists both by the common law and by the express terms of the statute under consideration. It is an obligation which imperatively demands the establishment of rules and regulations, as it would be utterly impossible for a corporation to serve all the individuals composing the public exactly alike, and upon exactly the same terms, without rules and regulations to govern its transactions.

Individuals and private corporations owe no duty to the public, except the duty to so use their own as not to injure others. They are not required to serve the public. They may exercise or not exercise their individual or charter rights as they see fit. Their dealings with the public are always a matter of private contract, and the terms of their contracts may differ in each individual case. But this is not true of public service corporations. They must exercise their charter powers, and they must exercise them in an orderly and systematic way. In other words, they must serve the public, and serve it impartially. This requires the establishment of a standard which shall govern the conduct of the public and the corporation in their dealings with each other, and

which shall constitute the measure of the rights and obligations of the respective parties, except insofar as those rights and obligations are prescribed by law. Such a standard is necessarily a system or body of rules and regulations.

Without the guide of rules and regulations, the public would have no means of ascertaining exactly what service the corporation was holding itself out to perform, and no means of determining whether it was discharging the full measure of its charter obligations. Nor would the public have any means of comparing the offers, the service, and the terms and conditions of performance in the multiplied instances, so as to be able to judge whether like service was rendered to all in a like situation, and rendered upon terms substantially alike.

It thus appears that rules and regulations are necessary for the corporation and necessary for the public. Because they are necessary for the corporation, the law confers the right to make them; because they are necessary for the public, the law imposes the duty of making them. The right and the duty exist just as forcibly under the statute as they did under the common law.

The plaintiff in error promulgated a rule that it would not furnish telephone service to any one

who owed for service rendered in the past. The rule was designed to protect the revenues of the company. It directly benefited the company, and indirectly benefited the public. It was enforced against all alike, without partiality or discrimination. It was adopted in good faith, under the belief that it was entirely reasonable, and that the company had a legal right to make and enforce it. Similar regulations had been held to be reasonable and valid by numerous courts.

Rushville Co-operative Telephone Company v. Irvin, 27 Ind. App. 62.

Tacoma Hotel Co. v. Tacoma Land Co., 3 Wash. 316.

Western Union Tel. Co. v. McGuire, 104 Ind. 130.

Vanderberg v. Gas Co., 126 Mo. App. 600.

Jones v. Nashville, 72 S. W. (Tenn.) 985.

Watauga Water Co. v. Wolfe, 41 S. W. (Tenn.) 1060.

Shiras v. Ewing, 29 Pac. (Kan.) 320.

Buffalo Telephone Co. v. Turner, 118 N. W. (Neb.) 1064.

Brass v. Rathbone, 47 N. E. (N. Y.) 905.

Hewlett v. Western Union Tel. Co., 28 Fed. 181.

And the Supreme Court of Arkansas had inferentially sanctioned such a rule, for it had held that the statute did not prevent telephone companies from requiring their patrons to pay in advance.

Yancey v. Batesville Telephone Co., 81 Ark. 486.

But the court drifted from its ancient moorings in the present case, and held, not that the defendant was guilty of discrimination, but that the rule under consideration was unreasonable and therefore void, and that its enforcement subjected the company to the penalties named in the act, even though it was done impartially and without discrimination. This was a complete and unexpected change of front, for the court had previously held that the statute was directed solely against discrimination, an interpretation which was approved and followed by the Federal Court of Appeals in construing the Tennessee statute, which was a literal copy of the act in question.

Phillips v. Southwestern Tel. & Tel. Co., 72 Ark. 478.

Yancey v. Batesville Telephone Company, 81 Ark. 486.

Cumberland Tel. & Tel. Co. v. Kelly, 160 Fed. 316.

The case presented by the plaintiff in error is simply this: While it is compelled, in the discharge of its *quasi*-public functions, to promulgate reasonable regulations to govern its transactions with the public, it must make and enforce those regulations at the hazard of a penalty of $100 a day if a regulation should be held to be unreasonable; and that, too, in the absence of any criterion in the statute or at the common law for determining in advance whether its regulations are reasonable or unreasonable, and without an opportunity of submitting the question to the courts, except at the risk of a like penalty in the event of an adverse decision. A construction of the statute which brings about such a condition, renders it obnoxious to the Fourteenth Amendment.

The plaintiff in error can not operate without tolls, and it is bound to establish regulations for the collection of its tolls. The right to collect tolls is a property right, and a statute which unduly restricts that right deprives the company of its property, at least to the extent of the restriction. A statute, like the one under consideration, which forces the company to refrain from making

and carrying out regulations, fairly designed and reasonably calculated to induce the prompt payment of current rentals, and to protect it from losses for services already performed, because it can not afford to guess at the question of reasonableness at the risk of the severe penalties denounced by the statute, deprives it of its property without due process of law.

The question whether a regulation is reasonable or unreasonable is a judicial one. The Legislature has not undertaken to decide it, nor has it prescribed any rule by which it may be determined. The company must make the regulation, but it has neither the means nor the power of authoritatively determining that a given regulation is reasonable. In its last analysis, that question must be decided by the courts. But the corporation can not invoke a decision by the courts. It is bound to make the regulations, and then it must wait until the public sees fit to sue. In the meantime the penalties have accumulated, and they will continue to accumulate until the suit is decided, unless the company modifies the rule at a sacrifice to itself, if the rule should finally be held to be reasonable, and at the expense of a heavy fine, and the peril of new penalties on account of the modification if that should be attacked, if the court should hold that the rule was unreasonable. The

enforced sacrifice of valuable rights by this statutory constraint amounts to a deprivation of property without due process of law.

Missouri Pacific Railway v. Nebraska,
217 U. S. 196.

A telephone company can no more perform its charter duties to the public without establishing reasonable regulations than a railroad company can engage in the transportation of goods without fixing a schedule of rates. Indeed, fixing a tariff of rates is neither more nor less than establishing a regulation. And since these *quasi*-public corporations are compelled to promulgate reasonable regulations, and can not do business with the public without them, a statute which forces them to discharge this duty at the peril of a severe penalty, if a court should differ with them on the question of reasonableness, deprives them o their property without due process of law.

A statute of Kansas prescribed a schedule of maximum rates to be charged by common carriers for the transportation of oil between points in that state, and provided that any carrier which demanded a greater rate should be liable to the person injured in the sum of $500 as liquidated damages. In discussing this statute, this court said:

"Being a common carrier, the company is not at liberty to accept or decline shipments of oil. It must receive and carry them when offered, and must be ready to name to shippers the rates at which that service will be rendered. If the statutory rates permit a reasonable return, they are controlling; if they prevent it, they are invalid. But of their obligatory character the company is not the judge. And yet it must choose whether it will give effect to them or no, and then must abide the result of its action."

And the court held that:

"As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the Fourteenth Amendment."

Missouri Pacific Railroad Company v. Tucker, decided June 16, 1913.

III.

Act of March 31, 1885, as Construed by the Supreme Court of Arkansas, Is in Conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

It is undoubtedly true that public service corporations can be controlled and regulated by the legislative department of the state, under what is commonly called the police power of the state.

But there are constitutional limitations to what the legislature may do under the police power, and it can not constitutionally deprive such corporations of the right to resort to the courts, any more than it can deprive them of their property without due process of law.

We have attempted to show that public service corporations are compelled to make and enforce rules and regulations for the conduct and management of their business with the public. They can not fulfill the purposes for which they are chartered, for they really can not operate at all, without rules and regulations. It is true that the regulations must be reasonable, but the question of reasonableness is a judicial one which neither the corporation nor the legislature can arbitrarily and finally determine. If the rules are reasonable, the corporation has a right to enforce them; if they are unreasonable, they are void. The question of their validity is, therefore, one to be determined by the courts.

A statute which debars public service corporations from access to the courts, or conditions, their resort to the courts by an arbitrary peril which other litigants are not required to assume, deprives them of the equal protection of the laws. Mr. Justice Brewer, in his observations upon this question in *Cotting v. Kansas City Stock Yards Company*, said:

"Do the laws secure to the individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure, either appropriates all his property or subjects him to extravagant and unreasonable loss?"

* * * * * * * * * *

"It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But, when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

Cotting v. Kansas City Stock Yards Company, 183 U. S. 79-100.

The question was not decided in the foregoing case, which went off on another ground, but the language quoted was subsequently approved by the court in a case in which the question was decided, and in the latter case, the court said:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this

court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418, 33 L. Ed. 970, 3 Inter. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or that may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily, a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested, the burden of obtaining a judicial decision of such a question (no prior hearing having ever been

given), only upon the condition that, if unsuccessful, he must suffer imprisonment, and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates, as provided by acts, are now too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."

Young, Ex parte, 209 U. S. 123.

It thus appears that the act of March 31, 1885, as applied to the plaintiff in error, is obnoxious to the equal protection clause, as well as to the due process clause, of the Fourteenth Amendment.

CONCLUSION.

The telephone company not only had the right, but it was its legal duty, to make reasonable rules and regulations for the conduct of its business with the public. It made a rule to the effect that it would not furnish service to those who would not pay for it. The rule directly benefited the company, but it indirectly benefited those patrons who paid their bills promptly, because it enabled the company to better perform its obligations to the public. The rule was made in good faith, and

it appeared to be reasonable on its face. It had been held to be reasonable by a number of courts, and it had never been held to be unreasonable by any court, so far as we have been able to ascertain. It was enforced with the most absolute impartiality, a thing which the law required, if it was to be enforced at all. Its nature, purpose and manner of enforcement was such that no one could have anticipated that it would be interpreted as involving an illegal discrimination.

During the years in which the rule was being impartially enforced, the Supreme Court had occasion to consider the statute in several cases. In every instance it held that the statute was directed solely against illegal discrimination. In not a single case did the court intimate that the statute was intended to prohibit unreasonable regulations. That phase of the subject seemed to be left to the rules of the common law. The decisions of the court were such as to confirm the defendant's faith in the fairness and legality of the rule in question. In the case at bar, however, the court changed its position and held for the first time that the rule was unreasonable, and that because it was unreasonable, it was void under the statute. The result is that the very impartiality and absence of discrimination which the defendant has so jealously sought to bring about in the enforcement of an apparently reasonable regulation, is

the very thing which will result in its undoing. In other words, the more strictly the defendant has adhered to the letter and spirit of the statute in the enforcement of this rule—the more impartial it has been—the more it has multiplied its liability under the decisions of the Supreme Court in the present case. The record shows that there were about five thousand subscribers to the telephone exchange in the city of Little Rock. It does not show how many have been compelled, in order to get telephone service, to pay their current bills. But the record does show that, without a single exception, the rule has been enforced against all alike, against the rich and the poor, the great and the small, the corporation and the individual, the business establishment and the private residence. If the present interpretation of the statute is to be upheld, and the defendant is to be required to respond to all those, who, by their failure or refusal to pay what they justly owed, have placed themselves in a situation similar to that which plaintiff occupies, there is no way to calculate the grand total of its liability. A construction which converts a seemingly reasonable and business-like rule into an instrument of self-destruction, without any standard in the common law, in the statute, or in judicial decisions, by which its reasonableness could be measured or determined in advance, and without an opportunity

to resort to the courts except at a hazard that was itself prohibitory, would seem on its face to bring the statute within the constitutional restrictions of the Fourteenth Amendment.

Respectfully submitted,

CHARLES T. COLEMAN,

For Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. [redacted]43

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, PLAINTIFF IN ERROR,

vs.

MRS. ADELIA P. DANAHER, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR ON QUESTION OF MEANING OF WORDS "TELEPHONE COMPANY."

By reference to the statute under discussion it will be seen that the first section of the statute is in part as follows:

> "SEC. 1. That any person or corporation organized by the laws of this State or of any other State of the United States or by virtue of the laws of the United States for the purpose of transmitting intelligence by telegraph or telephone * * * may construct, operate, and maintain such tele-

graph, telephone, or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of cities and towns," etc.

The succeeding sections of the bill refer to the *person* and *corporations* mentioned in the first section of the act by the term "telephone and telegraph *companies*" and some sections of the act use the words telephone "corporation." In section 11, being the one under consideration in this case, the words used are "Telephone Company."

In Lawther *vs.* Bridgman, 50 S. E., 410, the Supreme Court of West Virginia held that the word "companies" as used in its statutes, giving to the county courts authority to authorize any telegraph or telephone company to erect and maintain poles on the public roads, included an individual or individuals as well as incorporated companies. The court in its opinion cited approvingly the following cases:

Moran *vs.* Ross, 79 Cal., 159.

Singer Mnf. Co. *vs.* Wright, 97 Ga., 114.

Chicago Dock Co. *vs.* Garrity et al., 115 Ill.. 155.

State *vs.* Stone, 118 Mo., 388-397.

St. Bd. of Assessors *vs.* Central R. R. Co., 48 N. J. Law, 146.

The Keyport & Co. *vs.* The Farmers, &c., Co., 18 N. J. Eq., 13 (1st Syllabus).

Singer Mnf. Co. *vs.* Wright, 33 Fed., 121.

In the case of Singer Mf. Co. *vs.* Wright, 97 Ga., the court say:

> "We think, however, that so far as the law we are now dealing with is concerned, the whole difficulty may be properly removed by merely holding that the words 'every sewing machine company' would apply to a sewing machine 'man' who undertook to engage in the manufacture and sale of such machines in this State. This construction, upon reflection, will be found not to be a strained or unreasonable one. On the contrary, we think it is entirely permissible when reference is had to the object of the law in question; that object being not to tax a company or person carrying on the business, but the business itself."

In Moran *vs.* Ross it was held that a section of the Constitution providing for a railroad commission for the control of railroad corporations and transportation companies should be construed to extend to all persons engaged in the business of transportation whether as joint stock companies, partnerships or individuals.

The Supreme Court of Arkansas has held that whenever it upholds a statute it necessarily decides that the statute is constitutional whether the question of the constitutionality of the statute is discussed in the opinion or not.

Sadler *vs.* Craven, 93 Ark., 14.

Under the operation of this rule the Supreme Court of Arkansas having upheld the statute must necessarily have held that the injunctions and prohibitions of the statute applied to individuals engaged in the telephone business as fully as to corporations.

Respectfully submitted,

MIKE DANAHER,
For Defendant in Error.

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Supreme Court, U. S.
FILED
FEB 24 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted] 48

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.....*Plaintiff in Error.*

vs.

ADELIA P. DANAHER.....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR DEFENDANT IN ERROR

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SUPREME COURT OF THE UNITED STATES

No. 729

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.....*Plaintiff in Error.*

v.

ADELIA P. DANAHER.....*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR

Plaintiff in error does not state the facts correctly. It states that in April and May, 1908, when, before the 15th of each of those months, respectively, defendant in error tendered $2.25 in payment of her rental, the amount tendered was refused for the double reason that it would not be accepted at all, except on account, while her telephone was disconnected because of her refusal to pay her past in-

debtedness, and that she was not entitled to the customary discount when her account showed an unpaid balance. (Brief for Plaintiff in Error, p. 19).

On the contrary, the record shows the undisputed facts to be that defendant in error before April 15, 1908, tendered to plaintiff, as rental for that very month of April $2.25 (Record p. 101), the amount for similar service charged all customers who paid before the 15th of the month; that it did not refuse to accept the money except upon account, but refused to accept that amount for the month of April, and demanded $2.75 because it claimed that she owed an old bill, and for that reason was not entitled to this discount; that defendant in error then paid the $2.75 for service for April, (Record, p. 102), and, though plaintiff in error accepted the money, it still refused her service (Record, p. 102).

It is quite plain that plaintiff in error never for a moment considered this payment otherwise than as a payment of the rental for April, because, if it had intended to refuse it except as a payment upon the old account, it would, of course, have accepted the $2.25 in that way as readily as it took the $2.75.

The same things occurred in the month of May (Record, p. 102).

The rule that plaintiff in error claims to have established, as stated by itself, was that no service would be furnished to those who had not paid for service rendered in the past (Record, p. 106); but it should be borne in mind that defendant in error was not one who had not paid for

past services; she was only one that plaintiff in error *claimed* had not so paid. (Record, p. 108; Agreed State of Facts).

The contention of the plaintiff in error is that, while it is compelled to make reasonable rules for the conduct of its business, the Arkansas statute under which this suit was brought forces it to make such rules at the hazard of a penalty, if any of its rules should prove to be unreasonable; and that, too, in the absence of any criterion in the statute or at common law for determining in advance whether any such rule is reasonable or unreasonable, and without an opportunity of submitting the question to the courts, except at the risk of incurring the penalty in the event of an adverse decision.

Whether such a condition renders the statute obnoxious to the Fourteenth Amendment to the Constitution of the United States is, as we understand it, the sole question in this case.

This question has, however, by this Court been decided adversely to the plaintiff in error.

The State of South Carolina enacted a law requiring every common carrier to adjust and pay, within forty days after the filing of such claim, every claim for loss of property or damage to it, under a penalty of $50 for a failure to do so, provided that the penalty should not be incurred if the consignee failed to recover the full amount sued for.

In that case, the Railway Company contended, as does plaintiff in error in the instant case, that the courts were not open to it as to other litigants, in that, if it refused pay-

ment of any claim, and lost its case, it was subject to a heavy penalty.

It is obvious that, under the South Carolina statute, the railway company was compelled, when any claim was presented to it, to use its own judgment as to whether it was a just one and should be paid. If, in any case, its decision proved to be erroneous, and it refused to pay any claim which the courts afterwards found that it should have paid, it incurred the penalty.

The situation in this case is exactly the same. The plaintiff in error is required only to make no unreasonable regulations; if it makes a regulation which it considers reasonable, but the courts find to be unreasonable, it incurs the penalty.

Yet this court held that the South Carolina statute was not unconstitutional.

Seaboard Air Line v. Seegars, 207 U. S., 73.

It has also upheld other similar statutes.

Yazoo & Mississippi Valley R. R. Co. v. Jackson Vinegar Co., 226 U. S., 217.

It is comparitively easy for persons honestly to disagree as to the liability of the defendant in any suit or claim. Otherwise, indeed, there would be less litigation. But public service corporations have a vast advantage over individuals in the adjustment of claims. The former have large numbers of claims and are constantly well equipped to contest them all, both small and great; while an individual, having but one small claim, can not afford to go to the expense of enforcing it, however just it may be.

It is a notorious fact that the corporations have, for many years, taken advantage of this situation, and have adopted a regular system of delaying the settlement of all claims to such an extent that no individual having but a small claim could afford to enforce it. This system practically forced many individuals to abandon the enforcement of their small claims, however outrageously unjust such a result may have been. The aggregate amount which the corporations thus escaped paying was sufficiently large to make their dilatory tactics extremely profitable to them, and it was to remedy this condition that the South Carolina statute was enacted.

Likewise, telephone companies have, since they came into existence, pursued a high handed system of rendering bills to their patrons, and demanding payment of all items, regardless of whether they were justly due. A refusal to pay anything demanded, just or unjust, resulted in a refusal of service to the subscriber, who was at the mercy of the Company, for, in the absence of any penalty, the amount he could recover would be a mere trifle, vastly disproportionate to the expense of a suit to enforce his right to service. Moreover, in the meantime, he would be without telephone service, thereby losing vastly more than the amount of any judgment he might finally recover.

In such circumstances the only course open to any subscriber was to promptly pay any bill presented by the telephone company, however oppressive and unjust it may have been. To him, from a practical standpoint, the courts were absolutely closed.

But for the fact that these corporations have a mon-

opoly, they would not for a moment consider the making of a rule that they would not furnish service for which a person offered to pay in advance, because, forsooth, he would not pay money which he denied owing for services rendered in the past. The butcher, the baker, every one not wielding the monopolistic whip, is glad indeed to sell his wares for cash even to those who owe him old bills.

This fact alone makes the rules under which plaintiff in error pretends to have refused service to defendant in error so palpably unreasonable as to render its contention ridiculous.

It is difficult to understand how it can have the assurance to assert that it honestly thought a course so absurdly oppressive was reasonable, and to argue to this court that a law merely prohibiting such conduct is repugnant to the Fourteenth Amendment to the Constitution.

There is a wide distinction between the case of

Missouri Pacific Ry. Co. v. Tucker, 230 U. S., 340,

and the case now before the court. In the first place, this court held the statute involved in that case invalid merely because it fixed a definite amount to be forfeited which was out of all proportion to the actual damages incurred. Moreover, that statute fixed a rate to be charged by the Railway Company, without regard to whether it was reasonable. Here, the statute fixes no rule nor rate, but leaves the plaintiff in error to establish its own rules, requiring only that they be not unreasonable, or, rather, requiring plaintiff in error to furnish telephone service to the public, and pro-

hibiting it from discriminating, in the amount charged or otherwise, against any subscriber.

So far as we are able to discover, neither this court nor any other has ever denied the validity of any statute merely requiring a public service corporation to charge only reasonable rates and to enforce only reasonable rules, even though it is necessarily left to the courts, and not to such corporations, to say what is a reasonable rate or regulation.

This court and others have repeatedly held that, where the legislature does not state what is reasonable, the courts must decide that question when controversies arise.

> "A statute declaring that if any railroad corporation shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight, it shall be deemed guilty of extortion, is not void for uncertainty in not declaring what is a fair and reasonable rate. The courts have power to determine what is reasonable."
>
> *Chicago, etc. R. R. Co. v. Jones*, 149 *Ill.*, 361. 41 *Am. State Rep.* 283.

> "In the absence of any legislative regulation upon the subject the courts must decide for the company, as they do for private persons, when controversies arise, what is reasonable."
>
> *Dow v. Beidelman*, 125 *U. S.* 680.
>
> *C. B. & Q. Ry. v. Iowa*, 94 *U. S.* 155.

> "Undoubtedly in mere private contracts relating to matters in which the public has no interest what is reasonable must be ascertained judicially. But this is because the Legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be ex-

ercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable."

Munn v. People of Illinois, 94 *U. S.* 113.

To the same effect are the decisions in the following cases:

Budd v. N. Y., 143 *U. S.* 517.

Stone v. Trust Co., 116 *U. S.* 307.

In the present case, plaintiff in error simply contends that it has the right to make any rule it pleases, however, fantastic and unreasonable, and, under guise of it, to refuse service to any person it chooses. Then when suit is brought, it will have the perfect defense that it did not know such a rule would be held to be unreasonable.

If a negro who was once a slave incurred its displeasure, it could make a rule that it would serve none but the freeborn. It would not, if its theory be correct, incur the penalty, because it would not know in advance that such a rule would be held to be unreasonable, though any court would undoubtedly so consider it, just as any court would view as unreasonable the rule pleaded as a defense in this case.

At any rate, it must be left to the courts to decide what is reasonable; otherwise, of course, as the Supreme Court of Arkansas said in this case, the plaintiff in error, "by enforcing an unreasonable rule against all of its subscribers who refuse to obey it, could entirely abrogate the statute." (Record p. 157).

To protect themselves against loss by extending credit to persons unworthy of it, telephone companies have the

same means that the rest of us have. They can demand payment in advance, and we are all well aware that they do this. If, however, they choose, as individuals often do, not to avail themselves of this protection, they may still recover any amount justly due them by suit in the courts.

Such corporations, however, being wealthy, powerful and resourceful, by reason of their long course of dealings with individuals, a majority of whom are poor, without influence, and comparatively helpless, have waxed exceedingly arrogant, and have conceived the idea that they are above and beyond the reach of the laws which govern mere persons, and have, therefore, acquired the habit of punishing those who refuse to obey their every command, even though it be to pay them an unjust and unearned money tribute, by refusing to furnish a necessity which they monopolize.

Recognizing this, the various legislative bodies have enacted laws such as the one under consideration, and we cannot for one moment believe that this court will hold that the law is invalid, and, consequently, that these corporations may refuse service or furnish it as they please.

Plaintiff in error states that it based its belief that the rules in question were reasonable upon the fact that numerous courts had held them to be so, but an examination of the authorities cited by it does bear out that statement.

In the case of

Rushville Co-Operative Telephone Company v. Irwin, 27 Ind. App. 62.

the plaintiff neither paid nor offered to pay for the service

which was refused him. He had not paid for the preceding month's service, and he did not pay, as did defendant in error in the case at bar, for the month for which he was demanding service.

In the case of

Tacoma Hotel Company v. Tacoma Land Company, 3 *Wash.*, 316.

the plaintiff owed for services which had been furnished it in the past; it refused to pay for those services, and did not pay, nor offer to pay, for the present service which was refused.

In the case of

Western Union Telegraph Company v. McGuire, 104 *Ind.* 130.

there was merely a demand, on the part of the Telegraph Company that plaintiff pay in advance for an answer to a telegram which he wished to send requesting an answer. He neither paid, nor offered to pay for the service he demanded.

In the case of

Vanderberg v. Gas Co., 126 *Mo. App.* 600.

it was merely held that the gas company was at liberty to refuse service until the tenant of the house to be supplied contracted for it.

In the case of

Jones v. Nashville, 72 *S. W.* (*Tenn*)., 985,

the facts are not stated, but the court said that the assess-

ment required to be paid as a condition precedent to the furnishing of further service was not a past due indebtedness, but dues for water recently and then being furnished.

In the case of

Watauga Water Co. v. Wolfe, 41 *S. W.* (*Tenn*). 1060,

there was no question of payment at all, and the defendant merely refused to supply water to plaintiff unless he would agree not to waste it as he had been doing.

In the case of

Shiras v. Ewing, 29 *Pac.*, (*Kan*)., 320,

the court expressly stated that it held nothing except that a rule of the company against the unnecessary and useless waste of water was reasonable.

In the case of

Buffalo County Tel. Co. v. Turner, 118 *N. W.*, (*Neb*)., 1064,

the subscriber refused to pay in advance for the service which he requested.

In the case of

Brass v. Rathbone, 47 *N. E.* (*N. Y*)., 905,

there was a refusal to pay for water which it was not denied had been used, and no payment or offer to pay for the water demanded for present and future use.

In the case of

Hewlett v. Western Union Tel. Co., 28 *Fed.* 181,

the circumstances were the same as in *Western Union Tel. Co. v. Mc Guire, supra.*

On the contrary, every court before which this question has arisen, has decided that such a rule is unreasonable.

> "A telephone company may not arbitrarily refuse its facilities to any person desiring them and offering compliance with its regulations, and mandamus will issue to compel the company to do its duty.
>
> "It is insisted that the conduct of the relator (in refusing to pay an old bill which the telephone company claimed was due) now relieves respondent from any obligation to furnish the telephone, even if such obligation would otherwise exist.
>
> "We cannot see that the relations of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone, the law gives it an adequate remedy by action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either or perhaps both of the parties may have been in the wrong so far as the past is concerned we fail to preceive how it can effect the rights of the parties to this action."

State v. Nebraska Tel. Co., 17 *Neb.* 126; 52 *Am. Rep.* 404; 8 *Am. and Eng. Corp., Cases* 1.

In that case the relator had refused to pay for service received by him for the reason that he was not furnished with a directory.

In the case of

Wood v. City, 29 *L. R., A.*, 376 (*Me*)., the court said:

> "The complainant concedes that the rules of the old aqueduct company and of the present city water board are reasonable, so far as they require him to pay six

months in advance. He contends, however, that when the city has taken his money for one six months, paid according to its rules, it has waived any right to use the summary remedy of shutting off water to collect a disputed bill for any prior six months; that the city has thereby elected to continue him as a water-taker and resort to usual legal remedies for settling the prior dispute; that any rule of the water board of Auburn which assumes the power to receive the water-taker's money from six months to six months and then at any time deprive him of water because of an old and disputed bill, is unreasonable, and therefore void.

"We think this contention must be sustained. * * *

"The only trouble is over an old and disputed bill. The aqueduct company could have insisted on payment of this bill in advance, but did not. It could have shut off the water during the time covered by the bill, but did not. It preferred to let the bill and the dispute stand. Its successors, the city, with presumed knowledge of all the facts, did not shut the water off. It accepted Mr. Wood's money for the next installment, furnished water for that six months to him as one within his rights and its rules, allowed him to suppose that the old bill in dispute would be ignored or would be adjusted as are disputes between other parties. After having resumed these relations with Mr. Wood and taken his money therefor, the city now insists that he shall now be deprived of an instant and constant necessity in order to coerce him into a surrender of his position of defense against the old bill. Assuming that the rules of the old company and of the city contemplate this course, we think they are to that extent unreasonable, and therefore without legal force.

"The parties are not upon equal ground. * * * To suddenly deprive him (the consumer) of this water in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for water. He must surrender and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer

must pay it again, and, perhaps still again. He cannot resist lest he lose the water.

"It is said, however, that the consumer can apply to the courts to recover back any sum he is thus compelled to pay if it was not justly due from him, or if he can show affirmatively that it is not a just claim against him, he can by judicial process, restrain the company or municipality from shutting off the water. To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. That principle is that the claimant, not the defendant, shall resort to judicial process; that he who asserts something to be due him, not he who denies the debt, shall have the burden of judicial action and proof.

"It is said again that Mr. Wood, having resorted to this judicial proceeding, the city may now in this same proceeding show that there is no defense to the old bill and thus justify its action and have the prayer of Mr. Wood denied. The court cannot be required in this proceeding to investigate and determine whether there is anything due on that old water bill. The city or its predecessor at one time had the right to insist on its payment before furnishing water. That right as to that bill was waived fully and effectually. It cannot be resumed at the pleasure of the respondent. The water must be supplied to the complainant so long as he will promptly pay current installments and otherwise conform to the reasonable rules governing the supply of water. The respondent must now in its turn resort to judicial process if it desires to enforce any further payment."

We quote thus fully from this opinion because it is directly in point and seems to us so consonant with reason and justice.

In the case of

American Waterworks Co. v. State ex rel. Walker, 64 *N. W.* 711 (*Neb*).,

a patron of the water company failed to pay his water rent

on July 1. His default continued until August 17, when the corporation shut the water off from the patron's premises. August 18 the patron tendered the corporation the water rent fixed by its rules from July 1 to December 31, and requested that the water might again be turned on, but refused to pay the one dollar required by the rule for turning on and off the water. It was held that the corporation would be compelled by mandamus to turn the water on the patron's premises and that the inability of the corporation to collect the one dollar from the patron by the ordinary process of law because of the latter's insolvency afforded no excuse to the corporation for not supplying the patron with water.

In the case of

Crumley v. Watauga Water Co., (*Tenn.*), 41 *S. W.* 1058, the court said:

"The defendant in the present case cannot justify its declination to furnish water to the plaintiff by the fact of his failure to pay the whole or a part of his outstanding duebill given for water and piping furnished a year or two before. Upon the tender of the regular rates he was entitled to the water like other persons and without reference to his past due obligation. The company had given him credit for the matters covered by the duebill and could not thereafter coerce payment by denying him a present legal right."

Citing:

Merrimack R. Sav. Bank v. City of Lowell, (*Mass.*), 29 *N. E.* 97;

Wood v. City of Auburn, (*Me.*), 32 *Atl.* 906;

Am. Waterworks Co. v. State (*Neb.*), 64 *N. W.* 711.

In the case of

Crumley v. Watauga Water Co., supra,

there was no dispute as to plaintiff's indebtedness. He admitted it. Yet he was allowed damages for the action of defendant exactly similar to that of defendant in error in this case.

It thus appears that all the decisions of our various courts upon the subject would have indicated to plaintiff in error that its so-called rule would be held to be unreasonable.

It will be noted that the record shows that defendant in error at all times denied any past indebtedness to plaintiff in error (Record, p. 107); and, regardless of any decisions, we maintain that no one could have imagined to be reasonable a rule which required a subscriber to pay a disputed bill as a condition precedent to receiving further service; and, even if the old bill had been admitted to be just, such a rule would still have been equally unreasonable.

In all the cases cited by plaintiff in error, in which statutes were held to be unconstitutional, the statutes required the performance of a service for a fixed price, without regard to whether that price afforded reasonable compensation for the service. The only escape from the penalty, in such cases, was the performance of a service at a loss, and this, of course, was a taking of property without due process of law.

This case is far different. To escape the penalty, plaintiff in error had only to furnish service, but it could charge therefore any price it deemed proper. How, then can it be

said that the enforcement of the statute would take from it any of its property?

A compliance with the statutes held to be unconstitutional required the corporation to perform service without adequate compensation, while a refusal to comply subjected it to a heavy penalty.

Here, a compliance with the statute required only that the telephone company furnish service at its own price; and who can doubt that such a price would, to say the least of it, be commensurable with the service rendered?

The only thing taken from the plaintiff in error by a compliance with the statute would have been its means of revenge against defendant in error for daring to dispute its bill against her for services claimed to have been performed in the distant past; but we believe this court will agree with us that the Fourteenth Amendment to our Constitution was not designed to insure to monopolistic corporations the power to heap upon hapless individuals who disagree with them the indignity and discomfort of doing without a necessity which can not be had elsewhere.

In the case of

Missouri Pacific Ry. Co. v. Tucker, 230 *U. S.* 340,

relied upon by plaintiff in error, if the Kansas statute had merely required that the Railway Company transport all oil or other freight offered, upon payment, by the person offering it, of any price demanded by the Railway Company; if the shipper, in that case, had paid the full price demanded, and the Railway Company had simply refused to transport the oil, because the plaintiff had displeased it

by its past conduct, or otherwise; would this court have ruled as it did in that case? We think not.

Indeed, we think the statute in question, requiring as it does, nothing except the furnishing of telephone service upon payment of the ordinary price, which plaintiff in error itself fixes, is so obviously not in conflict with the Fourteenth Amendment to the Constitution, that no federal question could possibly be involved, and that it is apparent that the appeal to this court is prosecuted, not in good faith, but merely for delay, and that the penalty of ten per cent in such cases prescribed should be inflicted, and we now ask that this be done.

Respectfully submitted,

ADELIA P. DANAHER,

Defendant in Error.